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REPORTS
OF
CRIMINAL CASES

DECIDED IN THE APPELLATE COURTS

OF THE

STATE OF NEW YORK AND OF OTHER STATES,

AND IN THE

SUPREME COURT OF THE UNITED STATES;

WITH NOTES.

BY

PATRICK H. COWEN,

COUNSELOR-AT-LAW.

Volume II.

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COWEN'S CRIMINAL REPORTS.

COURT OF APPEALS.

NEW YORK, 1867.

THE PEOPLE V. MORING.

The defendant was indicted for selling sixty thousand bags of Java coffee as a broker, without having given the bond required by the statute of 1846, amended by the Laws of 1866.

The exaction from the broker of the fees or duties required by the law of 1866, is claimed to be an interference with commerce, and to be a tax or duty, upon imports, and so in violation of the constitutional provisions of section 13 of article 7 of the Constitution of the State of New York, and of the Constitution of the United States. (Art. 1, § 8, subd. 3; § 10, subd. 2.)

Held, That the principles to be extracted from adjudicated cases are as follows:

1. That the power of regulating commerce with foreign nations, and among the States, and the power of taxing imports or exports, belongs to Congress exclusively.
2. That Congress has no power to interfere with the internal traffic of a State. That authority is vested in the State alone.
3. That imported property, while remaining in the hands of the importer in its original form, cannot be taxed by State authority.
4. That when it leaves the importer's hands, and becomes incorporated with the general mass of the property of the country, it becomes subject to State taxation.
5. That taxation to sell in any form an article of import, intended for sale, or upon the necessary instrument of exporting an article intended for export, is a taxation upon the article itself, and not permitted by the Federal constitution.

6. That the imposition by a State of a tax upon a particular kind of business is constitutional, although the subject-matter of the business relates entirely to dealing with foreign countries.

George Bliss, Jr., for the people.

Wm. M. Ewarts and Waldo Hutchings, for the defendant.

HUNT, J. [After stating the facts.]—The demurrer was sustained in the court below upon the ground that the act of the legislature of New York in question was repugnant to the Constitution of the United States, and void. It was also held to be in violation of the provisions of section 13 of article 7 of the Constitution of the State of New York, and to be void for that reason. I shall examine these questions only, disregarding some defects and omissions in the framework of the indictment, which, if insisted upon, might be the occasion of technical embarrassment.

The defendant claims the law in question to be invalid, as being repugnant to that provision of the Constitution of the United States which authorizes Congress "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes," and also with that provision of the same instrument which declares that "No State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws" (Art. 1, § 8, subd. 3 ; § 10, subd. 2).

The exaction from the broker of the fees or duties required by the law of 1866, now before us, is claimed by him to be an interference with commerce, and to be a tax upon imports, and so in violation of the constitutional provisions quoted.

These provisions of the United States constitution have been the subject of frequent consideration in the federal courts ; and in seeking a conclusion in the present case, we are not without the aid of great land-marks to guide us in our way. An examination of the principles of the adjudicated cases will assist us in reaching a correct result in the case before us.

The case of *Gibbons v. Ogden*, 9 Wheat., 1, involved the validity of the act of the legislature of the State of New York granting to Livingston and Fulton the exclusive navi-

gation of all the waters within the jurisdiction of that State, with boats moved by fire or steam, for a term of years. These acts were adjudged to be a violation of the constitutional provision authorizing Congress to regulate commerce among the States, so far as they prohibited vessels licensed according to the laws of the United States for carrying on the coasting trade, from navigating the said waters by means of fire or steam. In discussing the question, what is this power of regulation, Chief Justice MARSHALL says :

“It is the power to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. * * * *

The wisdom and discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this as in many other instances,—as that, for example, of declaring war,—the sole restraints on which they have relied to secure them from its abuse. They are the restraints on which the people must often rely solely in all representative governments.”

This power to regulate commerce is exclusively in Congress, and cannot be exercised by the States (p. 199). Still, there remain to the States the rights, so important in their effects upon commerce, and so difficult to distinguish from its regulation, of framing and executing inspection laws, quarantine laws, health laws of every description, and a regulated system of pilotage.

In the case of *Brown v. State of Maryland*, 12 Wheat., 419, the leading opinion was delivered by the same learned judge; and the court held that an act of the legislature of the State of Maryland, requiring all importers of foreign goods by the bale or package, and other persons selling the same by wholesale, bale or package, to take out a license, for which they should pay fifty dollars, and in case of neglect, subjecting them to certain forfeitures and penalties, was repugnant to the section of the United States Constitution already quoted, in reference to regulating commerce, as well as to that forbidding the laying of duties or imposts.

The reasoning of the court is briefly this: An impost or duty on imports is a custom or tax levied on articles im-

ported, or brought into a country. Usually, and to prevent evasions of the law, this right is exercised before the importer is permitted to take possession of the goods. It is none the less an impost, however, when the levy is delayed until the goods are landed. The power to tax immediately upon landing is the same as the power to tax while entering the port. There is no difference between the power to prohibit the sale of an article and a power to prevent its introduction into the country. No goods would be imported if none could be sold. The same power which imposes a light duty may impose one amounting to prohibition. When the importer has so acted on the thing imported that it has become incorporated and mixed up with the mass of property in the country, it loses its distinctive character as an import, and becomes subject to the taxing power of the State; but while remaining the property of the importer, in his warehouse, in the original form or package in which it is imported, a tax upon it is plainly a tax upon imports, within the prohibition of the constitution. A tax on the sale of an article imported only for sale is a tax on the article itself.

I shall have occasion again to allude to certain distinctions contained in this opinion, which will be pertinent to the case in hand.

The three cases against the States of Massachusetts, Rhode Island and New Hampshire, termed the *License Cases*, are reported in 5 How. U. S., 504. It was there held that a law of Massachusetts, providing that no person shall presume to be a retailer of wine, brandy, &c., in less quantity than twenty-eight gallons, and that delivered and carried away all at one time, unless he is first licensed as a retailer of wine and spirits, and that the commissioners shall not be required to grant such license when in their opinion the public good does not require it, was not inconsistent with any provision of the United States constitution, or any act of Congress under it.

The law of Rhode Island forbade the sale of rum, gin, brandy, &c., in a less quantity than ten gallons, although the brandy which was sold in this case was duly imported from France into the United States, and purchased, by the party indicted, from the original importer. The law of New Hampshire imposed a similar restriction, although in this

case the article sold was a barrel of American gin, purchased in Boston, carried coastwise to Piscataqua, and there sold in the same barrel. These laws were also held to be valid within the provisions of the constitution and laws of the United States.

In these cases the leading opinion was delivered by TANNEY, Ch. J.

These decisions were placed upon the ground that, although the regulation of commerce with foreign nations and among the several States belonged exclusively to Congress, the regulation of the internal traffic of a State belonged to itself, free from any control or interference on the part of the Federal government.

The doctrine of *Brown v. Maryland*, that while goods were in the hands of the importer, in the shape in which they were introduced, and in which they were intended to be sold, they were not subject to taxation, either by direct assessment or by requiring a license to sell, was reiterated. The laws in question were held not to act upon the article until after it had passed the line of foreign commerce, and become a part of the general mass of the property of the State.

It was decided in *Nathan v. Louisiana*, 8 How. U. S., 73, that a tax imposed by a State upon all money or exchange brokers was not void for repugnance to constitutional power of Congress to regulate commerce; and this although the business of the defendant Nathan was confined exclusively to the sale and purchase of foreign bills of exchange.

It was held to be a tax upon the business of the defendant simply, upon his credit or his capital, and not a charge upon the commerce of the country.

The last case to which I shall refer is that of *Almy v. State of California*, 24 How. U. S., 169. The defendant Almy was indicted for a violation of a law of the State of California, which required a stamp of a certain value, expressing the amount of the duty, to be attached to any bill of lading for the transportation of gold or silver to any place without the State. The court held that this was substantially a tax on exports; that a bill of lading or some similar document, was an invariable accompaniment of ship-

ment, and that a tax upon the instrument was a tax upon the article itself. They say :

"The intention to tax the export of gold and silver, in the form of a tax on a bill of lading, is too plain to be mistaken."

The principles to be extracted from these cases are as follows :

1. That the power of regulating commerce with foreign nations, and among the States, and the power of taxing imports or exports, belongs to Congress exclusively.

2. That Congress has no power to interfere with the internal traffic of a State. That authority is vested in the State alone.

3. That imported property, while remaining in the hands of the importer in its original form, cannot be taxed by State authority.

4. That when it leaves the importer's hands, and becomes incorporated with the general mass of the property of the country, it becomes subject to State taxation.

5. That taxation upon the right to sell in any form an article of import, intended for sale, or upon the necessary instrument of exporting an article intended for export, is a taxation upon the article itself, and not permitted by the Federal constitution.

6. That the imposition by a State of a tax upon a particular kind of business is constitutional, although the subject matter of the business relate entirely to dealings with foreign countries.

Judged by these principles, I can discover no objection to the legislative acts now under discussion.

Since the year 1784, the legislature of the State of New York has, from time to time, passed laws taxing the sales of goods by auctioneers. This has been the practice, both as to foreign and domestic goods. L. 1784 (1 Greenl.) 64 ; L. 1792 (2 Greenl.) 470.

The constitution of 1821 recognized this practice, and provided for the purposes to which the moneys thus received should be applied. § 10, art. 7 ; L. 1824, c. 47 ; L. 1838, c. 52 ; L. 1864, c. 62.

This taxation has been a valuable source of revenue to the State of New York, often reaching to a quarter of a million

of dollars annually. During a period of eighty years this right has been unchallenged. The fact that no dispute has been raised upon this point for so long a period of time, is strong evidence that the right cannot be successfully disputed. See *Ryan v. N. Y. C. R. R. Co.*, 35 N. Y., 210; *Costigan v. M. & H. R. R. Co.*, 2 Den., 609.

The right to tax sales by auction is fully recognized in *Brown v. Maryland, supra*. The learned chief justice says:

"So, if he sells by auction. Auctioneers are persons licensed by the State, and if the importer chooses to employ them, he can as little object to paying for this service as for any other for which he may apply to an officer of the State. The right of sale may very well be annexed to importation, without annexing to it also the privilege of using the officers licensed by the State, to make sales in a peculiar way." And again: "It is true, the State may tax occupations generally, but this tax must be paid by those who employ the individual, or is a tax on his business. The lawyer, the physician, or the mechanic, must either charge more on the article in which he deals, or the thing itself is taxed through his person. This the State has a right to do, because no constitutional prohibition extends to it." A tax on the occupation of an importer, he says, is prohibited by the constitution.

In *Nathan v. Louisiana (supra)*, Justice McLEAN, in delivering the opinion of the Court, uses this language: "Under the law, every person is free to buy or sell bills of exchange, as may be necessary in his business transactions; but he is required to pay the tax if he engages in the business of a money or an exchange broker. The right of a State to tax its own citizens for the prosecution of any particular business or profession within the State has not been doubted. And we find that in every State money or exchange brokers, vendors of merchandise of our own or foreign manufacture, retailers of ardent spirits, tavern-keepers, auctioneers, those who practice the learned professions, and every description of property not exempted by law, are taxed."

The right to tax the proceeds of auction sales, when the articles sold are imported from foreign countries, is not

within any of the prohibited principles heretofore stated as drawn from the decisions of the Federal courts. It may be enforced without a violation of any of them. The importer may reship to foreign countries if he desires. He may consign his goods to the interior, if he finds it to his interest to do so. He may sell them at his own counter or warehouse for cash or credit. He may exercise every conceivable act of ownership, without restraint or liability to taxation, with a single exception. If he resorts to the mode of a sale at public auction, the sale subjects the auctioneer to the payment of a duty upon the amount of his sales. It seems to me quite extravagant to maintain that this exception is an infringement upon the right to import, or that it imposes a tax upon the business of the importer.

I conclude that the long-existing laws of the State, imposing taxes upon sales by auctioneers, are valid. I am unable to perceive that sales made by brokers stand upon any different footing. Neither the auctioneer nor the broker, so far as the present case shows, is a public officer, required to take an oath of office, and indictable at common law for failure to perform his duties. Each is a *quasi* officer, required to give to the State a bond, with sureties, conditioned for the faithful performance of the duties of his office, and is by statute made liable to an indictment if he attempts to act without having given the required bond. The one invites competition for the articles intended to be sold, by *viva voce* bidding at an assemblage of people. The other invites competition by calling individually for the bids of those who desire to purchase the articles to be sold, or receiving their bids at his own place of business. Each is a middleman acting as agent, both for a buyer and a seller. The moment he ceases to represent each of these parties, he ceases to be an auctioneer or broker, and becomes a party on his own account, or an agent for a buyer only, or a seller only. Each receives his compensation from the parties for whom he acts, and each is bound to pay the duties to the State. I see no substantial difference between the vocation of a broker and that of an auctioneer, for the purposes of the question before us. The duties imposed upon the sales of the latter have long been recognized by the laws of this State, as well

as by the statements of the Federal Judges, as properly imposed. I believe this recognition is due to the justice of the claim, and that the constitutional inhibitions which I have discussed could not at any time have been successfully urged against the collection of these duties. The tax upon broker's sales occupies the same ground, and, in my opinion, is legally chargeable under the law in question. This demurrer, therefore, cannot be sustained on the ground that the law in question is repugnant to the provisions of the Constitution of the United States.

It is said, again, that the act of the legislature of the State of New York of the year 1866 is invalid, as being in violation of section 13, article 7, of the constitution of this State. That section is as follows:

"Every law which imposes, continues or revives a tax, shall distinctly state the tax, and the object to which it is to be applied; and it shall not be sufficient to refer to any other law to fix such tax or object."

It will be observed that the original act was passed in the year 1846, before the adoption of the constitution containing the present provision. No such provision was contained in the constitution of 1821. By article 7, section 10, of that instrument, all duties upon goods sold at auction were appropriated to the completion of the navigable waters of the State, and the payment of the debt contracted in the construction of the same. By the fifth amendment to the constitution of 1821, this appropriation of duties was determined, and the same were thereby restored to the "General Fund" of the State. There was thus a permanent and express appropriation of these duties when the act of 1846 was passed. The act of 1866, in question, merely made an addition to the subject-matter of the former law. It provided that sales of brokers should be placed in the same category, in regard to the payment of duties, as sales by auctioneers. It was simply an amendment of an existing law, valid in all its provisions. It may be doubted whether such an amendment can properly be termed the imposition or revival of a tax.

Again: I agree with the intimation of Judge OAKLEY, in *Sun Mut. Ins. Co. v. City of New York*, 5 Sandf. 10, 14; that this section was not intended to be applied to laws

which imposed duties, fees, or excises on particular professions, classes of trade, or individuals, but that the same relates only to a general tax upon the property of the State. The section of the constitution immediately preceding forbids the creation of a State debt, except under certain restrictions, and provides that the law authorizing the debt shall also provide for the imposition of a direct annual tax, to pay the interest and the principal within a specified time. This law is required to remain in force until the debt is paid or provided for. This section, I have no doubt, contemplates a general tax upon all the property of the State, and was not intended to be satisfied with, or to apply to, a local tax upon a particular section, or to a tax imposing fees or duties upon trades or individuals, although the same are direct taxes, equally as if imposed upon the entire property of the State. The section in question is applicable to the same class of taxation, and was never intended to reach a case like the present. Hawkers' and peddlers' fees, canal tolls, railroad tolls, are all taxes, in the enlarged meaning of that term, but, I apprehend, not within the meaning of that expression in the section of the constitution under consideration.

Judgment should be reversed and judgment ordered for the People upon the indictment, with leave to the defendant to withdraw his demurrer and plead to the indictment within twenty days.

All the judges, except BOOKES, J., not voting, concurred with HUNT, J., in the opinion that the act was not in conflict with the State constitution.

SCRUGHAM, J.—The questions presented by this appeal are as to the conformity of the act of April 13, 1866, entitled "An act to amend chapter sixty-two of the Laws of eighteen hundred and forty-six, and other acts additional to the same," with the Constitutions of this State and of the United States.

The objection that it does not comply with the provisions of section 13, article 7, of the constitution of this State, is fully answered in the opinion of Judge HUNT, and it is only necessary to consider whether the act is in any respect repugnant to the Constitution of the United States.

By section 8 of article 1 of the Constitution of the United States, it is, among other things, provided that Congress shall have power to lay and collect duties, imposts, and excises, and to regulate commerce with foreign nations ; and section 10 of the same article provides, among other things, "that no State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for exercising its inspection laws ; and the net produce of all duties and imposts laid by any State on imports or exports, shall be for the use of the treasury of the United States, and all such laws shall be subject to the revision and control of the Congress."

The act under which the defendant in error was indicted, subjects "foreign wines and ardent spirits," and "all goods, wares, merchandise and effects imported from any place beyond the Cape of Good Hope," and "all other goods, wares, merchandise and effects which are the production of any foreign country," offered for sale by sample or otherwise by brokers, every time they shall be sold, to duties, which are specified in the act, and are payable into the treasury of the State for its use.

It thus, by its very terms, lays duties upon imported articles, and in no manner discriminates between such as retain, and such as have lost, their character as imports ; and, as it affects sales of the former, it is to that extent in conflict with the provisions of the Constitution of the United States.

There can be no doubt of the power of a State to tax articles which have been imported for sale, after they have passed into the mass of general property, by being sold by the importer either for consumption or resale, or by being divided by him into smaller quantities by the breaking up of the casks or packages in which they were imported, so as to destroy the character of import which subjected them to duties under the laws of the United States ; but until the importer has so, by sale or otherwise, acted upon the articles as to cause them to lose their character of imports, a State tax upon them would be in direct violation of the constitutional prohibition ; and a tax upon their sale, if it were possible to regard it otherwise than as a tax upon the article itself, would be in derogation of the right to sell, which is

an inseparable incident of the law permitting importation, and which the importer acquired by the payment of duties to the United States.

Such a power in a State is incompatible with the power of Congress to regulate commerce, for it could be used to destroy it, by subjective sales of imported articles to so high a tax as absolutely to prevent them.

The case of *Brown v. State of Maryland*, 12 Wheat., 419, was one involving the constitutionality of an act of the legislature of Maryland, requiring importers and other persons selling certain imported foreign merchandise by wholesale, by the bale or package, to take out a license, and pay a fee of fifty dollars therefor.

The right of a State to impose duties upon imports and the sales of imported merchandise, was there fully considered, and is discussed with great ability in the opinion of the court, which embodies an unanswerable argument against State taxation of imported merchandise, or sales of such merchandise, until it has lost its character of an import.

It is said, in the course of the opinion, that "auctioneers are persons licensed by the State, and if the importer chooses to employ them, he can as little object to paying for this service as for any other for which he may apply to an officer of the State."

The right of sale may very well be annexed to importation, without annexing to it also the privilege of using the officers licensed by the State to make a sale in a peculiar way.

It is not claimed that brokers are in any respect officers of the State of New York, and therefore this consideration as to sales by State officers, such as the auctioneers to whom allusion is made, is inapplicable to the question before us.

In *Nathan v. Louisiana*, 8 How. U. S., 73, it was held that a State tax upon brokers in bills of exchange, was not repugnant to the constitution of the United States, because it was a tax which the State had an undoubted right to impose on a citizen for the prosecution of a particular avocation within its jurisdiction; and because foreign bills of exchange are neither exports nor imports. Though such bills are instruments of commerce, they are no more so than products of agriculture or manufactures, over which the

taxing power of the State extends, until they are separated from the general mass of property by becoming exports.

The distinction between that case and this is therefore very apparent, for the act there upheld did not subject exports or imports to State taxation, but only imposed a duty upon the prosecution of a particular business within the State, while the act now under consideration subjects imports to State taxation, and cannot be construed as merely imposing a tax upon brokers in respect to their avocation. The act assumes to impose duties on the imports sold, and not on the brokers by whom the sales are made.

The judgment should be affirmed.

DAVIES, Ch. J., and WRIGHT, GROVER and PORTER, JJ., concurred in this opinion.

Judgment affirmed, with costs.

COURT OF APPEALS.

NEW-YORK, 1855

THE PEOPLE v. WILLIAMS.

The defendant was indicted for the murder of his wife, and the jury found him guilty, with a recommendation to mercy.

On the trial it was shown, under objection, that the accused on the Saturday evening before her death left the house of Mary Campbell, the witness, "with clothing for her husband, who was a watchman on some ship in the North River, as she said; she did not return until five o'clock the next morning; when she came in she appeared very ill; she said she got sick on board the vessel on which her husband was; she said she had not been drinking; she said that her whole frame seemed as if it were on fire, and her heart felt awful."

The court charged the jury that they might infer that the deceased was with her husband on the Saturday night preceding her death, although the evidence on that point was very slight. Exception was taken to this by the counsel for the prisoner.

Held, error. The intention of the deceased in going from the house of the witness with clothing was not material; it was not part of the *res gesta*, nor was the declaration of the deceased that she was ill, competent as a dying

declaration ; for although the deceased returned very ill, there is no evidence nor any reason to believe, that she apprehended a fatal result.

Held, that the admission of the recognizance in evidence without proof of its execution ; its having been properly filed ; or the identification of the persons recognized, was error.

A. Oakey Hall, for the people.

Henry L. Clinton, for the prisoner.

DENIO, J. The evidence to show that the deceased came to her death from the effects of arsenic taken into her stomach was quite satisfactory ; and there was strong reason to believe that she swallowed a portion of this poison during her absence from the house in Duane-street, between Saturday evening and Sunday morning. If, during that absence, she was in the company of the prisoner, the latter had an opportunity to administer it to her in food or drink. His subsequent conduct was such as to attach suspicion to him, and to lead to the belief, more or less strong, that, if she was poisoned during that absence, he was guilty of the act, provided it was made to appear that he had an opportunity of committing it. Hence it was an important fact for the prosecution to establish that these persons met together while the deceased was abroad on Saturday night. It was competent to show this by the evidence of persons who saw them in each other's company ; or it might have been proved by the prisoner's confession. There was some evidence of the latter character ; for the prisoner was proved to have asserted that the deceased did not indulge in drinking while she was away from home, at the time referred to, a fact which he could scarcely have known except by having been with her. Although the inference from this declaration was pretty strong, and might have enabled the jury to find the fact, it was not of such a conclusive character as to preclude other testimony upon the point, and the prosecution sought to furnish such other evidence by proving the declaration of the deceased, of her intention to go to her husband, when she set out from home on Saturday evening. The question to be determined is, whether that declaration was competent to be given in evidence.

The evidence of the witness Mary Campbell, of what the

deceased said, after her return, as to her having been with her husband, was not objected to. It was, however, clearly incompetent. It was not admissible as a dying declaration; for although the deceased returned very ill, there is no evidence, nor any reason to believe, that she apprehended a fatal result. The circumstance that it was received without objection, and that it tended even more strongly to show the existence of the material fact sought to be proven than the declaration which was objected against, does not relieve us from the duty of examining the validity of that objection. The jury may have disregarded the incompetent declarations made by the deceased after her return, and have relied upon the proof of her declared design on setting out, which the court had held to be competent; or the ruling of the court, admitting her declaration last mentioned to be received, may have led them to the belief that all her declarations which were proved were competent. We must therefore determine whether the decision of the court below, admitting proof of the statement that she was going to see her husband, when she left the house on Saturday night, was correct or not. It was attempted, on the argument, to be sustained as a declaration characterizing an act, and constituting, in legal understanding, part of the act itself. This is a recognized exception to the rule excluding hearsay as evidence; for when it is necessary, in the course of a cause, to inquire into the nature of a particular act, or the intention of the person who did the act, proof of what the person said at the time of doing it is admissible in evidence for the purpose of showing its true character. 1 Phil. on Ev. 231, Gould's ed. But to render the declaration competent, the act with which it is connected should be pertinent to the issue; for where the act is in its own nature irrelevant, and when the declaration is *per se* incompetent, the union of the two will not render the declaration admissible. *Wright v. Doe*, 7 Ad. & E., 289. The material fact here was, that the prisoner and the deceased were together on Saturday night. Even this was not a principal fact, but only a circumstance to show that the prisoner had an opportunity to commit the offence. That the deceased left the house in Duane-street at a particular time was of no materiality, unless it was also shown that during her absence she met the

defendant. The act itself was indifferent to the issue, whatever the intention was with which it was done. If the deceased met the prisoner, and thus afforded an opportunity of committing the offence, it is immaterial whether she intended or expected to meet him or not; and so, of course, if she failed to meet him he could not properly be prejudiced by the circumstance that she went out with a design to go to him. The evidence was not offered to qualify an act connected with the issue, but to induce the jury to infer another act not otherwise shown to exist: that of his being in company with the deceased. Suppose a declaration had been made by the deceased, on the previous day, of an intention to go to her husband on that particular evening; such declaration, being unaccompanied by any act, would rest wholly in assertion, and would be clearly without the rule referred to; yet the proof would be essentially of the same character, and subject to no greater objections than the evidence we are considering.

I am of opinion, therefore, that the case was not within the rule admitting a declaration accompanying an act, on the ground of its being a part of the *res gestæ*; and I know of no other ground upon which the case can be taken out of the general rule which excludes, under the name of hearsay, declarations not made under the responsibility of an oath.

Enough has been said to show that the judgment of the Supreme Court ought to be affirmed.

Upon a second trial the question will again arise as to the admissibility of the evidence showing that arsenic was found in the bowl which was examined by the chemist. We have looked carefully into the evidence of the identity, and are of opinion that it was sufficient to authorize the court to submit the question to the jury.

The judgment of the Supreme Court must be affirmed.

HAND, J.— The proof of what the deceased said when she was leaving the house of Mrs. Campbell was not admissible. It was no part of the *res gestæ*, for it was no part of the principal transaction, not contemporaneous, or even incidental to it. It was spoken at a time previous to any part of the transaction constituting the supposed offence, and in

the absence of the prisoner, and when the deceased had no apprehension of danger, and much less was she *in extremis*.

I see no objection to the testimony in relation to the bowl or its contents. Whether the evidence was sufficient to identify the former, or show what constituted the latter, were questions for the jury, and the proof given on these points was competent for their consideration. No one portion of it, or that given by one witness, might have been sufficient; but all of it together might be, and the prosecution was not obliged to give conclusive proof at every step.

It was also competent for the prosecution to prove that the prisoner had made payments upon the paper produced in court. That was a mere circumstance, and the production of the paper and such proof did not contravene any rule of evidence in relation to the proof of written instruments.

But the recognizance itself was given in evidence without any proof of its execution, except what appeared upon the face of the instrument, and the testimony of an agent of the governors of the alms-house that the prisoner had made payments upon it. I am inclined to the opinion this was not sufficient. A recognizance is said to be a matter of record. 1 Chit. Crim. L., 90; *People v. Kane*, 4 Den., 530. But this was taken before a police justice in the city of New York, under the statute in relation to disorderly persons, and is but an acknowledgment, upon which, perhaps, a record might be made up. It does not appear to have been filed with any officer, and there was no proof of its execution, nor of the identity of the persons recognized, except by the payments. Using one's own affidavit in a cause may sometimes be sufficient evidence of identity as against the party making it; but, as a general rule, even an affidavit cannot be given in evidence, at least before it is filed with the proper officer, without some proof. 1 Chit. Crim. L., 576; 1 Phil. on Ev., 379; *Bellinger v. People*, 8 Wend., 598; *Rex v. Smith*, 1 Stra., 126; 2 Cow. & H., 1100. This recognizance must have been introduced for the purpose of showing an inducement to commit the crime, or that difficulties had existed between the husband and wife. It purported to have been signed by the prisoner and another, and to have been taken before an officer; but it would be

dangerous, especially in a capital case, to admit such a document without any proof whatever.

However, it is not necessary to pursue this point further, as the admission of evidence of what the deceased said before the commission of the supposed offence clearly entitled the prisoner to a new trial, and the Supreme Court was therefore right in reversing the judgment on that point. The judgment should be affirmed.

A majority of the judges concurred.

Judgment affirmed.

COURT OF APPEALS.

NEW YORK, 1874.

COLEMAN V. THE PEOPLE.

The defendant was indicted in the county of Monroe for the crime of receiving stolen goods, knowing them to be stolen.

Held, that the rule is well established, that in cases like the present, where guilty knowledge is an ingredient of the offence charged, the same may be proved as other facts are proved, by circumstantial evidence, and that other acts of a like character, although involving substantive crimes, may be given in evidence to prove the *scienter*. The principal limitation of this rule is, that the criminal act which is sought to be given in evidence, must be necessarily connected with that which is the subject of the prosecution, either from some connection of time and place, or as furnishing a clue to the motive on the part of the accused.

Held, that the declarations of a party to a civil or criminal procedure, in respect to matters within his own knowledge, or of which he may be presumed to have knowledge, and relevant to the issue, are always competent against him.

Held, that the true rule and the only rule that can be sustained upon principle is, that the intendment of law is, that an error in the admission of evidence is prejudicial to the party objecting, and will be ground for the reversal of the judgment unless the intendment is clearly repelled by the record. The error must be shown conclusively to be innoxious. It is not enough that the appellate court may be of the opinion that the result ought to, and probably would, have been the same if the objectionable evidence had been excluded, and especially ought not such a presumption avail to cure an error upon a criminal trial.

J. C. Cochrane, for the prisoner.

Geo. Raines, district attorney, for the people.

ALLEN, J. The plaintiff in error was convicted in the Court of General Sessions of Monroe county, of the crime of receiving stolen goods, knowing them to have been stolen, and from the judgment of the Supreme Court affirming the conviction error is brought to this court. The objection that the prosecution having given evidence tending to prove one offence could not be permitted to prove another under the indictment, and as the foundation for a conviction, is untenable. The district attorney had announced, in his opening address to the jury, that he should seek to prove and ask a conviction for receiving five bars of pig-iron on the evening of the 10th of March, 1873, and the evidence concerning that alleged to have been stolen during the night of that day and found on the sidewalk in front of the store of the accused, on the morning of the eleventh of March, came out incidentally and without objection, in answer to an inquiry to the witness under examination, one of the owners of the property alleged to have been stolen, as to how his attention was drawn to the loss of pig-iron by his firm. It was not given as evidence in chief, and with a view to convict for receiving that iron, but as preliminary to proof of the search for and discovery of that alleged to have been stolen on a prior occasion and received by the accused on the preceding evening. No attempt was made then or at any subsequent stage of the trial to show that the iron found on the sidewalk had come to the possession of, or been received by the accused; on the contrary, the district attorney expressly declared that he did not claim that it ever was in his possession.

Passing for the present two or three exceptions to the admission of evidence, the residue of the fifty taken by the accused, upon the trial, can be classified under two general heads:

First, exceptions to the admission of evidence of other transactions of like character to that under investigation; and, secondly, to the admission of evidence of the declarations of the accused as to his dealings in iron of the charac-

ter and description of that for the receiving of which he was on trial, and the testimony of witnesses tending to prove the falsity of those declarations.

The question as to the admissibility of evidence coming within the first class of exceptions, was considered by this court in *Coleman v. People* (55 N. Y. 81) and *Copperman v. People* (MS. opinion of Chief Judge CHURCH), 56 N. Y., 591. In both, the rule is recognized as well established, that in cases like the present, where guilty knowledge is an ingredient of the offence charged, the same may be proved as other facts are proved, by circumstantial evidence, and that other acts of a like character, although involving substantive crimes, may be given in evidence to prove the *scienter*. The principal limitation of the rule is, that the criminal act which is sought to be given in evidence, must be necessarily connected with that which is the subject of the prosecution, either from some connection of time and place, or as furnishing a clue to the motive on the part of the accused.

In this case, the transactions in respect to which evidence was given were all intimately connected in point of time, place and circumstance with that for which the accused was indicted, so that they formed a continuous series of transactions, each throwing light upon the other, upon the question of knowledge, intent and motive. The evidence was of a stealing, by the same persons from whom the accused was charged with receiving the iron mentioned in the indictment, from the same owners and prosecutors, of iron of a similar description and like kind, but a short time before the transaction under investigation, and the purchase of the iron by the accused for a very inadequate price, and, if the evidence was believed, with actual knowledge that the iron was stolen. Within all the cases the evidence was competent. (1 Phil. Ev., by Edw., 767, 768, and note, 207; Roscoe's Cr. Ev., 92; *Rex v. Davis*, 6 C. & P., 177; *People v. Hopson*, 1 Den., 574; *Rex v. Ellis*, 6 B. & C., 145; 1 Greenl. Ev., § 53.)

The declarations of the accused and the other evidence reached by and included within the other class of exceptions were clearly admissible. The declarations of a party to a civil or criminal procedure, in respect to matters within his own knowledge, or of which he may be presumed to have

knowledge, and relevant to the issue, are always competent against him. The character and extent of the business and dealings of the accused in pig-iron of the character and general appearance of that alleged to have been feloniously received by him, was material to the inquiry as among the circumstances bearing upon the question of scienter, and his integrity in the purchase and receipt of that alleged to have been stolen. If unsatisfactory, or fabricated and false statements were made by him in accounting for the possession of, and mode of storing and dealing with, the iron found in his possession; if false statements were made by him as to the person from, or for whom, or purposes for which he bought such iron, it would be a strong circumstance for the prosecution, as showing a consciousness of wrong, tending to show *mala fides* and a knowledge by the accused of the manner in which his patrons and clients acquired the property. (1 Phil. Ev., by Edw., 601; *Reg. v. Mansfield*, 1 C. & M., 140.)

We have carefully examined the other exceptions, but do not find any that were well taken. The rulings of the court upon the admission and rejection of evidence of which the plaintiff in error now complains were right, and the questions raised by the objections and exceptions of the accused were properly disposed of. Had incompetent evidence been admitted by the court against the objection of the plaintiff in error, it would have been cause for the reversal of the conviction. We cannot concur in the views of the Supreme Court, as expressed in the prevailing opinion, that if any error was committed it did not prejudice the party on trial, and that the result would have been the same if the evidence objected to had been excluded. The rule undoubtedly is, that when a fact is conclusively proved, by competent evidence, so that the court can see that no prejudice or injury could possibly have resulted from the admission of incompetent evidence to prove the same fact, its admission will not be cause for interfering with the result or reversing a judgment; but the rule is to be cautiously applied, especially in criminal cases. (*Williams v. Fitch*, 18 N. Y., 546; *People v. White*, 14 W. R., 111; *Erben v. Lorillard*, 19 N. Y., 299.) The true rule and the only rule that can be sustained upon principle is, that the intendment

of law is, that an error in the admission of evidence is prejudicial to the party objecting, and will be good ground for the reversal of the judgment unless the intendment is clearly repelled by the record. The error must be shown conclusively to be innoxious. (*Vandervoort v. Goreld*, 36 N. Y., 639; *People v. Gonzales*, 35 id., 49.) It is not enough that the court setting in review of the judgment may be of the opinion that the result ought to, and probably would, have been the same if the objectionable evidence had been excluded, and especially ought not such a presumption avail to cure an error upon a criminal trial. In the case at bar the principal witnesses to establish the crime and prove guilty knowledge, and the circumstances from which the jury might infer a guilty knowledge, were the thieves by whom the iron was stolen. They were thoroughly impeached by their own testimony, and many of their statements were highly improbable as they are spread out and appear on the record. They were not entitled to credit except as they were corroborated by other credible testimony, and the circumstances of the case as proved to the satisfaction of the jury. In a case depending for its chief support upon evidence of this character, and upon circumstantial evidence, it is impossible to say that any of the evidence objected to may not have affected the result. But for the reason that the evidence objected to was technically competent and properly admissible, the conviction must be affirmed.

All concur.

Judgment affirmed.

COURT OF APPEALS.

NEW YORK, 1855.

THE PEOPLE v. THOMS.

The defendant was indicted for having in possession, with intent to utter, an altered bill. On the trial the district attorney proved the finding of the altered bill upon the defendant; his confession that the bill "was one he had *fixed* that day," and that "he did not think he had passed over three in a week, perhaps not more than one," and that "it was a great trouble for so little money." The district attorney further proved, under objection, that the officer "searched the defendant's wife and found in her possession the handkerchief produced, having a large number of the ends of figures in the margin cut from bank bills now shown."

Held, that the evidence showing the wife had in her possession engraved figures, cut from genuine bills, was incompetent, as there was no evidence of any concert between the prisoner and his wife, or that either of them had any knowledge of the facts which were proved against the other. Where two persons sustaining the relation of husband and wife are each found doing acts indicating criminal designs of the same nature, there are strong reasons for conjecturing that they are conspiring together; but it is mere conjecture, and not evidence, even presumptive of the fact.

A. Oakey Hall, district attorney, for the people.

Jonas B. Phillips, for the defendant.

DENIO, J. The fact that the prisoner had the altered note in his possession was fully proved; and the only question was as to his knowledge of its character, and his intention respecting it. The prosecution affirmed that he possessed it with the intent to pass it as true. If he was concerned in altering it from a lower denomination, and especially if he carried on to any extent the business of detaching the numerals from genuine bills and affixing them to the notes of a lower denomination, it would naturally be presumed that he had some object in doing so, and none which could be suggested would be so probable as that he intended to pass off the note which was found on him, which had been dealt with in the same way. Very strong evidence to show him engaged in this unlawful practice was given, independently of that which arose out of the search of the person of his

wife ; but the prosecution was not content to rest the case upon that evidence, but persisted, against the prisoner's objection, in showing that she had in her possession engraved figures, cut from genuine bills, suited to the commission of this species of forgery. If this evidence was incompetent, the Supreme Court was right in reversing the judgment, whatever may be thought of the strength of the case against the prisoner upon the other evidence.

There was no other evidence of any concert between the prisoner and his wife, or that they were mutually engaged in altering bank bills, or that either of them had any knowledge of the facts which were proved against the other. Where two persons sustaining the relation of husband and wife are each found doing acts indicating criminal designs of the same nature, there are strong reasons for conjecturing that they are conspiring together ; but it is mere conjecture, and not evidence, even presumptive of the fact. Now, the possession by the wife of these fragments of notes was enough, legally, to fix upon her the suspicion of criminal intention ; but the presumption would not attach to the husband unless we shall first suspect, that, from their domestic relation, one of them (and especially the female) would not engage in such an enterprise without the co-operation of the other. But such a suspicion, though natural enough, is quite too vague to be made the foundation of a criminal judgment. If this evidence should be held competent, I do not see but that the criminal conduct of the wife, in any matter which admitted of the participation of another, might always be given in evidence against the husband, upon the presumption of concurrence growing out of conjugal relation. The evidence was clearly incompetent, and without examining the other exceptions, we must hold that the judgment was erroneous, and that it was rightly reversed by the Supreme court.

The judgment of the Supreme Court should be affirmed.

DEAN, J., was of opinion that inasmuch as the house of the prisoner, or his store, might have been searched, or any person in the house who might have been associated with him,—and if anything had been found upon such person, or in the house which was connected with the bills found on

the prisoner, it would have been evidence for the consideration of the jury,—*a fortiori*, the possession of the wife who was cohabiting with the husband was competent evidence.

A majority of the judges concurred in reversing the judgment.

SUPREME COURT.

First Department.—New York, 1874.

DILLON v. THE PEOPLE.

The defendant was tried and convicted of grand larceny, in stealing a quantity of pig-iron.

Exception was taken to the refusal of the court to take the case from the jury, on the ground that the description of the identity of the property, was too indefinite, vague and uncertain, to convict the defendant upon, and not sufficient in law to be submitted to the jury.

Held, that the testimony of the agent being, that it bore the marks, and presented the appearance of the iron in his possession, some of which had been taken away, and that he did identify the iron, when he saw it the following day after the defendant was arrested, and the uncontradicted testimony that the defendant said he bought the iron of a canal boat captain for fifteen dollars, when its value was shown to be fifty-two dollars, to be sufficient to justify the submission of the question of the identity of the property to the jury.

The defendant's counsel requested the court to charge the jury, that the mere possession of the property stolen, was not *prima facie* evidence of the commission of the larceny by the defendant. The court so refused to do, and an exception was taken.

Held, that the possession was so recent and so suspicious, that it was consistent with no other rational conclusion, than that of guilt. "Generally, whenever the property of one man, which has been taken from him without his knowledge or consent, is found upon another, it is incumbent upon that other to prove how he came by it; otherwise the presumption is that he obtained it feloniously." (2 East's Crim. Law, 656.) Its accuracy as a general legal proposition, is sustained by the decision made in the case of *Knickerbacker v. The People*, 1 Cowen's Crim. Rep., 287.

The court declined to charge the proposition, that where a man, in whose possession stolen property is found, gives a reasonable account of how he came by it, the prosecutor was required to show the account to be false.

Held, that while the proposition might be true, as to a large class of cases, the prosecutor cannot be required to show that the defendant's statements are false, as long as the circumstances attending it, are such as to indicate that

they are not true. What the law requires, is, that the defendant's statement should be credited where it appears to be probable, and consistent with the facts. The question is one for the jury.

Peter Mitchell, for the prisoner.

Benj. K. Phelps, district attorney, for the people.

DANIELS, J. The defendant, Steven Dillon, was convicted of the crime of grand larceny, in the Court of General Sessions, and sentenced to be imprisoned in the State prison, for the term of five years.

Exceptions were taken, in his behalf, to the charge given the jury, and to refusals on the part of the learned recorder, to charge as requested by the defendant's counsel. After judgment, a writ of error was issued, for the purpose of securing a review of such exceptions.

The first was taken to the refusal of the court to take the case from the jury, on the ground that the description of the identity of the property, was too indefinite, vague and uncertain, to convict the defendant upon, and not sufficient in law to be submitted to the jury.

The property charged to have been stolen, was twenty-eight bars of pig-iron. And the evidence of the agent having it in charge, and who was the sole agent here at the time for its sale, was, that it bore the marks, presented the appearance, of the iron in his possession, some of which, he testified, had been taken away from the premises where it was deposited, and from a boat having a portion of it on board, during the night, in early morning of which the defendant was arrested. His testimony was, that he did identify the iron, which he saw early in the following afternoon, by its marks and looks. This, with the fact that it was found in the defendant's boat upon the river, at half-past three o'clock in the morning, and his subsequent statement that it was bought of a canal boat captain for fifteen dollars, when the uncontradicted evidence was that its value was about fifty-two dollars, were sufficient to justify the submission of the question of the identity of the property to the jury. The case in this respect, was entirely different from the authority relied upon by the defendant's counsel in support of this objection. (*State v. Furlong*, 19 Maine,

225.) The proof in that case did not show that the property, found in the defendant's possession, had been stolen at all, and the witness who was alleged to be its owner, could not identify it, so as to distinguish it from the same kind of property sold to his customers residing in the same vicinity as the prisoner. While, in the present case, the evidence of the agent showed that a larceny of the iron had been probably committed; that the quantity taken was similar to that found in the prisoner's possession; that it had the marks and appearance of the iron in the agent's custody; and that no other iron of that description, was, at the time, probably on deposit, or for sale in the vicinity. The proof was sufficient to render it the duty of the court to submit the identity of the property to the jury.

The comments of the court on the evidence given by the same witness, that, on being shown the iron the next day, he recognized it beyond any doubt, as being the property which had been taken away from his possession, was also excepted to. No request for its modification in any respect was made on the part of the defendant. And it is certainly true, that the statement made, was fully as strong as the evidence of the witness would justify. He did not, in words, say that he recognized the property as his beyond any doubt, but it is not difficult to perceive that he intended as much as that by the statement which he made. He testified that he did identify the iron as that which he was sure he saw, the night before, on the boat at his dock. That he had received it about a week before, and knew it by its being new iron, the color of the sand used by the company that manufactured it, the shape of the pigs, and the letters upon it. That he would be pretty certain about it, without the letters, but not as certain as with them. The fair inference from his statements was, that the iron found with the defendant, was a part of that sent to him for sale, and which had been carried away during the preceding night. And no reason exists for supposing that he entertained the least doubt as to the correctness of his statements. They were made with a sufficient degree of positiveness, to justify the comment made upon them by the learned recorder.

The defendant's counsel requested the court to charge the jury, that the mere possession of the property stolen, was not

prima facie evidence of the commission of the larceny by the defendant. This the court refused to do, and the defendant's counsel excepted.

The request must, of course, have been designed and understood to relate to the defendant's possession, as that had been shown by the evidence given in the course of the trial. There was no dispute as to the facts constituting that portion of the case. The larceny appeared to have been committed some time during the night, and the property was found by the police, in the possession of the defendant and another person with him, in a small boat managed by them, at half after three o'clock in the morning. The possession, at that unseasonable hour for lawful purposes, was, within the authorities, sufficient to maintain the presumption of the defendant's criminal agency in procuring it. It was so recent, and so suspicious, that it was consistent with no other rational conclusion, than that of guilt. "Generally, whenever the property of one man, which has been taken from him without his knowledge or consent, is found upon another, it is incumbent upon that other to prove how he came by it; otherwise the presumption is that he obtained it feloniously." (2 East's Crim. Law, 656.) This was cited with approbation, in the case of the *State v. Furlong* (*supra*), and its accuracy as a general legal proposition, is sustained by the decision made in the case of *Knickerbacker v. The People*, 43 N. Y., 177; S. C., 1 Cowen's Crim. Rep., 287.

As the proposition was first stated by the court, concerning the presumption arising from the fact of recent possession of stolen property, it was rather too decided against the defendant. For it is a presumption of fact; one which the jury may act upon, and not one which by law they are required to follow. But it was afterward qualified, and submitted to the jury in that form. The court, upon that subject, responded to the request of the defendant's counsel, that it was presumptive evidence, and further charged, that stolen property, immediately afterward found in possession of a party, afforded the presumption that the person having the possession, had stolen it. The case was finally submitted to the jury upon that proposition, and it was as favorable to his case as the defendant had any legal right to require.

The court also declined to charge the proposition, presented by the defendant's counsel, that where a man, in whose possession stolen property is found, gives a reasonable account of how he came by it, the prosecutor was required to show the account to be false. That may be true, as to a large class of cases where considerable time has elapsed between the taking and the discovery of the fact of possession, but, to bring the case, upon this point, within the rule relied upon by the defendant's counsel, as it is stated in the authority cited by him, it is necessary it should appear that a reasonable account of how the possessor came by the property, should be given to those finding him in possession. (*Regina v. Crowhurst*, 1 Car. & Kir., 370.) In the present case, nothing of that kind was done. For, according to the evidence of the policeman who made the arrest, the defendant gave no account of his possession, until he and the other person arrested were at the police court, sometime after the arrest had been made. The defendant himself swore that he told the policeman, at the time of the arrest, that he had bought the iron. When or where he claimed to have bought it, he did not state that he disclosed. What he said he stated himself, gave no reasonable account of the manner in which he obtained possession of the iron, and, under the circumstances attending his detection and arrest, it was wholly unworthy of belief. Even if the proposition, as the court was requested to charge it, had been accurate, it was not raised by the evidence given in the case. Beyond that, the prosecutor cannot be required to show that the defendant's statements are false, when given in exculpation of what seems to be a guilty possession, as long as the circumstances attending, are such as to indicate that they are not true. The question is one for the jury, who would ordinarily acquit on the faith of them, where they appeared to be probable, but would reject them under circumstances throwing grave suspicions upon their truth. No arbitrary, unbending rule exists upon this subject, applicable to all cases of possession of stolen property. What the law requires, is, that the defendant's statement should be credited where it appears to be probable, and consistent with the facts. While, on the other hand, the jury is not only at liberty, but it is their duty to

decline to adopt and act upon it when it is inconsistent with other facts proved, tending to establish guilt, and it is suspicious and improbable in itself. There is nothing in the case, from which the defendant's conviction can be held to have been improper, and the judgment should therefore be confirmed.

DAVIS, P. J., and BRADY, J., concurred.

Judgment affirmed.

COURT OF APPEALS.

NEW YORK, 1874.

KELLY ET AL. v. THE PEOPLE.

The prisoners were jointly indicted and convicted of grand larceny.

Held, that the voluntary declarations and admissions of one on trial for a criminal offence, are always evidence against the party making them, and are more or less cogent as evidence of guilt, depending upon the circumstances under which they are made. The same principle gives effect to the action of the accused as evidence tending to prove or disprove his guilt. (Following, *Teachout v. The People*, 1 Cowen's Crim. Rep., 247; *The People v. Wentz*, same vol., 51; *Commonwealth v. Cuffee*, 108 Mass., 285; *Same v. Crocker*, id., 464.)

Held, that, where an individual is charged with an offence, or declarations are made, in his presence or hearing, touching or affecting his guilt or innocence of an alleged crime, and he remains silent, except in cases the individual sought to be affected could not with propriety speak, as in a judicial investigation, or a discussion between third persons, so that for him to speak would be a manifest intrusion into a discourse to which he was not a party, the evidence is competent and should be admitted.

Held, that it is no objection to the admission of the declarations of the accused, as evidence, that they are made while he is under arrest, and his admission, either express or implied, of the truth of a statement made by others under the same circumstances is equally admissible. His conduct and acts, as well when in custody as when at large, may be given in evidence against him, and their cogency as evidence will be determined by the jury.

Held, that a conspiracy may be proved, as other facts are proved, by circumstantial evidence, and parties performing disconnected overt acts, all contributing to the same result and the consummation of the same offence, may, by the circumstances and their general connection or otherwise, be satisfactorily shown to be conspirators and confederates in the commission of the offence. If there was evidence to justify the conclusion that the parties were all acting with a common purpose and a common design,

and although there may have been no previous combination or confederacy to commit this particular offence, the conduct and actions of the several parties, and the parts they severally performed in the actual perpetration of the crime, was sufficient to make the acts and declarations of each, from the commencement to the consummation of the offence, evidence against the others. The declarations were not given in evidence to prove the guilt of the parties on trial, and as the declarations of one conspirator against another, but as a part of the *res gestæ*, a part of the history of the transaction, and as such it was competent.

Held, that the admission of the question "What did Reynolds say?" and the answer "There goes the other one," or "one of the parties," "the lawyer," pointing to Mulhall, under the objection it was "not rebutting evidence," was not error, as it was discretionary with the court to permit the prosecution to give evidence not strictly responsive, and an exception does not lie to the exercise of such discretion.

Held, that the juror, Perry, having sold his real estate before the time of the trial, and not being assessed for personal property, was not a qualified jurymen, and the holding that the property qualification, when questioned by a challenge, must be that required to authorize the original selection of the individual as a juror, was not error.

R. W. Peckham, for prisoners.

N. C. Moak, district attorney, for the people.

ALLEN, J. The voluntary declarations and admission of one on trial for a criminal offence, that is, those not made under duress, or induced by menaces or promises, are always evidence against the party making them, and are more or less cogent as evidence of guilt, depending upon the circumstances under which they are made. The same principle gives effect to the action of the accused as evidence tending to prove or disprove his guilt. (*Teachout v. People*, 41 N. Y., 7; *S. C.*, 1 Cowen's Crim. Rep., 247; *People v. Wentz*, 37 N. Y., 303; *S. C.*, 1 Cowen's Crim. Rep., 51; *Commonwealth v. Cuffee*, 108 Mass., 285; *Same v. Crocker*, id., 464.) When the conduct of the accused, either before or after being charged with the offence, is given in evidence, it is for the jury to draw the proper inferences and determine whether it is consistent with innocence, or is indicative of a guilty mind, proving more or less conclusively the commission by him of the particular offence charged. (*Roscoe's Cr. Ev.*, 18; *People v. Rathbun*, 21 Wend., 509.)

When an individual is charged with an offence, or declarations are made in his presence or hearing, touching or

affecting his guilt or innocence of an alleged crime, and he remains silent when it would be proper for him to speak, it is the province of the jury to interpret such silence, and determine whether his silence was, under the circumstances, excused or explained. At most, silence under such circumstances is but an implied acquiescence in the truth of the statements made by others, and thus presumptive evidence of guilt, and in some cases it may be slight, except as confirmed and corroborated by other circumstances. But it is some evidence, and therefore, except in those cases where the statements are made upon an occasion and under circumstances in which the individual sought to be affected could not with propriety speak, as in the progress of a judicial investigation, or in a discussion between third persons not addressed to or intended to affect the accused or induce any action in respect to him, so that for him to speak would be a manifest intrusion into a discourse to which he was not a party, the evidence is competent and should be admitted. Any declaration of the individual in response to a statement so made would be admissible in evidence, and an omission to make any answer to it or to notice it, like other acts of the party, is to be interpreted, and such effect given to it as evidence, in connection with the other circumstances of the case, as the jury in their discretion shall think it entitled to. The implication of assent to a statement affecting the guilt or innocence of an individual, from an omission to controvert, qualify or explain it, arises from the fact that a person knowing the truth or falsity of a statement affecting his rights, made by another in his presence, will naturally, under circumstances calling for a reply, deny it, if he be at liberty to do so, if he does not intend to admit it. (*Donnelly v. State*, 2 Dutcher, N. J. R., 601.) It is no objection to the admission of the declarations of the accused, as evidence, that they were made while he was under arrest, and his admission, either express or implied, of the truth of a statement made by others under the same circumstances is equally admissible. His conduct and acts, as well when in custody as when at large, may be given in evidence against him, and their cogency as evidence will be determined by the jury. (*People v. Wentz*, *supra*; *Hochreiter v. People*, 2 Abbott's Court of Appeals Decisions, 363; *McKee v.*

People, 36 N. Y., 113; *Teachout v. People*, *supra*; *Commonwealth v. Cuffee*, and *Same v. Crocker*, *supra*.)

The case of the *Commonwealth v. Kenney* (12 Met., 235), was peculiar in its circumstances, and the opinion by the learned chief justice, speaking for the court, would seem not to be in harmony with the current of authority in this country or in England, or with the elementary writers. It is distinguishable from this case in this, that there were no direct evidence of the main fact; except as implied by the omission of the prisoner to deny the statement of the individual claiming to have been robbed, of the fact of robbery and a description of the money lost. To make the evidence admissible as an implied admission of the fact stated, it had to be assumed that the accused had personal knowledge of the facts stated; for he was only called upon to deny, and could only deny statements of the truth or falsity of which he had personal knowledge. Here the *corpus delicti* was proved by other evidence, and neither the declarations of the prosecution nor the admission of the prisoners, either express or implied, were relied upon for that purpose. The sole object and purpose of the evidence objected to was to identify the persons accused as the individuals committing the offence, and upon that question they were well qualified to speak and knew whether the statements of the prosecutor were true or false. The declaration and statements of the prosecutor, in the presence and hearing of Kelley and Ormsby at the second precinct station-house, with proof that the prisoners did not controvert them, were properly given in evidence. The persons named had been arrested upon hot pursuit immediately after the offence, without process, and taken to that place for safe custody, and the prosecutor was there to identify them and have them further detained if he could recognize them as among those concerned in the alleged larceny. He did identify them and charged them with participating in the robbery, stating the part each took in the commission of the offence; and it was not only proper for the prisoners to speak if the prosecutor was mistaken and they were innocent, but the circumstances were such as apparently to call for a denial. Although the statements were not addressed directly to them, they were the subjects

of the conversation and parties to it, in this that they could with propriety and without a breach of decorum take part in it. They were, for all practical purposes, parties to the discussion. The declaration was, in substance, a challenge to them to assert their innocence if they were not guilty. The description of the money by the prosecutor was not a very material part of the transaction, but it was not incompetent. It was clearly not irrelevant, and, taken in connection with the fact that the description tallied with that of one parcel of money immediately thereafter found on the person of one of the prisoners, who made a request that the two parcels found on him should be kept separate, as the other parcel was "bar money," making no reference to that which had been so well described by the prosecutor, or controverting his claim to it, gave it significance, and made it material as an implied acquiescence in the truth of the statement of the prosecutor that he had been robbed of that money by the prisoners and their associates.

It is true that the record does not show that the prosecutor gave evidence of any reply or omission to reply to the statements, but the counsel for the prisoners objected to evidence that the prisoner remained silent when the prosecutor described the money lost and declared that they were the persons who had taken it, and the objection was overruled and exception taken, and other witnesses present at the same interview supplied the omission and proved that they made no answer or statement except that referred to in respect to the two parcels of money, and a statement by both that the prosecutor was mistaken as to a third person whom he supposed was present at the larceny, they declaring he was not present. The correction of the mistake of the prosecutor, as to the presence of one of the individuals accused by him, gives significance to their silence as to their own presence at and participation in the robbery. The statements of the prosecutor were only in evidence as laying the foundation for and giving character and effect to the declarations, as well as the silence of the prisoners, and were not proved either as evidence of the facts stated or as corroborative of the testimony of the prosecutor-in-chief. All the circumstances necessary to render the evidence ad-

missible, and give effect to the silence, as well as the declarations of the accused, were present.

1st. The statements and declarations of the prosecutor, identifying the prisoners, were pertinent and relevant to the occasion upon which they were made, and the offence to which they related, and detention of the accused. They were part of the *res gestæ*.

2d. They were made in the presence and hearing of the parties interested, and whose rights were affected by them, and under circumstances which rendered a contradiction or explanation by the prisoners proper and reasonable, if they were not true.

3d. They were of matters, the truth of which was known to the accused.

4th. A reply by the prisoners would have been natural and proper if the statements were false.

The evidence of the remark of Mulhall, to the prisoner Clune, that Sullivan, one of the officers aiding in the arrest, was all right, or would make it all right, was objected to as incompetent and immaterial. There was *prima facie* evidence of a combination and confederacy between Mulhall, Clune and the others aiding in the commission of the offence, and any conversation between Clune and Mulhall, relating to the offence or the means of avoiding detection or evading punishment was competent as against either, and it was only proved as against Clune, Mulhall not being on trial. It was pertinent and relevant to the issue, and, therefore, it was not error to admit it, although it is believed it could not have affected the result of the trial. It was certainly not so material that it might not have been stricken out without essentially weakening the prosecution. As said by Judge Cowen, in *People v. Rathbun (supra)*, of circumstantial evidence, it is extremely difficult to establish a case of irrelevancy in the matter of the declarations and conduct of persons accused of crime, or of confederates in crime in the presence of each other. The acts and declarations of the person by whom the complainant was enticed from the steamboat and led to the saloon where the larceny was committed, were clearly competent as a part of the *res gestæ*. There was abundant evidence to justify the conclusion that the parties were all acting with a common purpose and a com-

mon design, and although there may have been no previous combination or confederacy to commit this particular offence, the conduct and actions of the several parties, and the parts they severally performed in the actual perpetration of the crime was sufficient to make the acts and declarations of each, from the commencement to the consummation of the offence, evidence against the others.

A conspiracy may be proved, as other facts are proved, by circumstantial evidence, and parties performing disconnected overt acts, all contributing to the same result and the consummation of the same offence, may by the circumstances and their general connection or otherwise be satisfactorily shown to be conspirators and confederates in the commission of the offence. One party may allure the victim into the den, leaving it to others to effect the robbery, and all will be held equally guilty as confederates. Here the decoy remained with the victim until the larceny was committed, and his relation to and intimacy with the persons on trial were such as to authorize the jury to draw the conclusion that there was a conspiracy between all those present or taking any part in the transaction. The declarations were not given in evidence to prove the guilt of the parties on trial, and as the declarations of one conspirator against another, but as a part of the *res gestæ*, a part of the history of the transaction, and as such it was competent. The means adopted to entice the complainant from the steamboat were as much a part of the larcenous taking of the money, contributing as directly to the commission of the completed offence, as was the taking of the money by Ormsby. Both and all that intervened were parts of the one transaction, culminating in the robbery effected by all the means employed by the offenders, whether in the presence of each other or when separated.

There was no error in the admission of evidence of the direction of the complainant to the officer to arrest Mulhall, given in the presence of Clune. It could not have prejudiced the prisoners on trial, and was a part of the history of the pursuit and arrest of the offenders immediately after the commission of the offence, and may properly be regarded as a part of the *res gestæ* transpiring in the presence of the prisoners as against whom only it was proved. But while

it was not irrelevant, it is enough that by no possibility could it have prejudiced the prisoners or affected the result of the trial. Another answer might be found to the suggestion of error by reason of the admission of the evidence in the form of the objection and exception. The first question objected to was, "What did Reynolds say?" It having been proved that Clune was present and in hearing, and the evidence being offered against him, the question was competent and the objection properly overruled. The answer was, "There goes the other one," or "one of the parties," "the lawyer" pointing to Mulhall, and this was objected to as "not rebutting," and on no other ground. If not strictly replicatory, although given in response to the evidence on the part of the defence, it was discretionary with the court to permit the prosecution to give evidence not strictly responsive, and an exception does not lie to the exercise of such discretion.

One Perry, drawn and appearing as a juror, was challenged by the prisoners, and on examination it appeared that at the time he was put on the jury list he was a freeholder owning a farm in Guilderland, for which he was assessed, but was not assessed for personal property. The challenge of the prisoners was withdrawn, but renewed by the prosecution and the juror discharged.

The qualifications of jurors are prescribed in the directions to the town officers whose duty it is to select them and prepare the lists from which the ballots are prepared for the drawing of jurors. (2 R. S., 411, § 13.) The direction is to take such only as possessing the other qualifications, are at the time assessed for personal property belonging to them in their own right to the amount of \$250, or who shall have a freehold estate in real property in the county belonging to them in their own right, or in the right of their wives, to the value of \$150. The juror was not qualified, and could not, at the time of the trial, have been selected as a juror by the town officers, or been placed on the list of jurors. A subsequent section of the statute (§ 33) makes it imperative upon the court to discharge any person from serving on a jury, when it shall appear that he is not at the time the owner of the freehold estate or real property prescribed by the statute, "and is not the owner of personal property to

the value of \$250 ;" and it is claimed, on behalf of the plaintiffs in error, that, it not appearing that the juror did not own personal property to the amount named, it was error to allow the challenge of the prosecution. But this section was not designed to regulate or affect the challenges, but to give the right to the juror to be discharged on his own motion. The property qualification of the juror, so far as it depends upon the ownership of personalty, must appear and be evidenced by the assessment roll, and suitors are entitled to the benefit of the challenge if this is wanting. When a juror applies in his own behalf to be discharged from the performance of his public duty, the legislature might well require him to prove, not only that he was not assessed for personal property, but that he ought not to be. But the general qualification of jurors, and the rights of those who may challenge such qualifications are not affected by this provision. The right of challenge for want of proper qualifications is a strictly legal right, and must be determined by the statute prescribing the qualifications. (3 Bl. Comm., 362.) As an application for a discharge under section 33, it would not have been a part of the trial, but addressed by the juror to the discretion of the court and not the subject of review. There was no error in disposing of the challenge and holding that the property qualification when questioned by a challenge must be that required to authorize the original selection of the individual as a juror.

The judgment must be affirmed.

All concur.

Judgment affirmed.

COURT OF APPEALS.

NEW YORK, 1874.

THE PEOPLE v. DAVIS.

The prisoner was convicted under the provisions of the statute "for the better prevention of the procurement of abortions," Chap. 181, Laws of 1872.

The indictment contained three counts: The first two charged the advising and procuring one Clara Pensy to submit to the use of an instrument by one Crandall, with intent to procure a miscarriage, thereby causing the death of the mother and child. The third count charged the same and that said defendant advised and procured said Clara Pensy to take certain drugs and medicines with like intent. The indictment further charged the offence to have been committed in Madison county, within 500 yards of the boundary line between Madison and Otsego counties.

After the jury had been sworn, and before the case had been opened on the part of the people, the counsel for the prisoner moved to quash the indictment on the grounds: First, that the offence was alleged to have been committed in the town of Brookfield, in the county of Madison. Second, to quash the third count on the ground that it contained two distinct and separate offences, and was bad for duplicity. Both motions were denied.

The counsel for the defendant then asked the court to compel the district attorney to elect upon which count he would try the defendant. This was also denied.

On the trial, Mrs. Phebe Pensy testified on the part of the people, that the defendant and his wife came to her house, and that Clara Pensy went away with defendant in a buggy, and they returned about one o'clock in the night; that the witness did not see the defendant on his return nor speak to him, nor did he come into the house when he came back.

The district attorney then offered to show that Clara stated to the witness, upon her return, what had been done to her while she had been away, which offer was allowed by the court, under objection. The witness then testified to what had been done and said by Dr. Crandall.

The district attorney offered to prove the dying declarations of Clara Pensy, which were admitted under the objections of the counsel for the defendant.

The jury rendered a general verdict of guilty, and the counsel for the defendant moved in arrest of judgment on account of the alleged defect in the third count.

Held, that the statute provides that where an offence shall be committed on the boundary of two counties, or within 500 yards of such boundary, an indictment for the same may be found and a trial and conviction thereon may be had in either of such counties. It is sufficient if the indictment shows jurisdiction in the grand jury by which the indictment is found, over the offence, and the jurisdiction of the trial court to hear and determine it.

Held, that the motion in arrest of judgment was properly denied. The verdict was general, finding the accused guilty upon all the counts. The indict-

ment contained two counts confessedly good ; this will sustain the conviction, irrespective of other defective counts.

Held, that the denial of the motion to quash the third count, or to compel the prosecution to elect upon which offence he would proceed, was not error. The denial of this motion was not the proper subject of an exception. The accused has not the legal right to have the sufficiency of an indictment, or of any count therein, determined upon motion to quash or set it aside ; or to put the prosecutor to an election, when more than one offence is charged, upon which he will proceed. It is in the discretion of the court whether or not to set aside a defective indictment upon motion ; and unless the question is free from doubt, the court ought not to do it, but leave the counsel to his demurrer, or motion in arrest of judgment.

Held, that section 1, chapter 181, Laws of 1872, provides that any person who shall thereafter wilfully administer to any woman with child, or prescribe for any such woman, or advise or procure her to take any medicine, etc., or shall use and employ or advise or procure her to submit to the use and employment of any instrument or other means whatever, with intent thereby to produce the miscarriage of any such woman, unless, etc., shall, in case the death of such woman or of such child be thereby produced, be deemed guilty of a felony, etc., and that as the third count charges the use of these prohibited means to perpetrate the crime, the miscarriage of the woman ; and in consequence of some one or all, that the death of the child and woman were effected, and charging all as constituting a single felony, there is no duplicity. The law sanctions this mode of pleading in criminal cases.

Held, that the admission of evidence of the statement of the deceased, in the absence of the accused, as to what was done and said by Dr. Crandall at his office, was error. Anything said accompanying the performance of the act, explanatory thereof or showing its purpose or intention, when material, is competent as part of the act. But when the declarations offered are merely narratives of past occurrences, they are incompetent, and not part of the *res gestæ*.

Held, also, that this ruling could not be sustained upon the ground that the deceased was a co-conspirator. To make the declaration competent it must have been made in the furtherance of the prosecution of the common object, or constitute a part of the *res gestæ* of some act done for that purpose. A mere relation of something already done for the accomplishment of the object of the conspirators is not competent evidence against the others. The means to produce the miscarriage, upon the theory of the prosecution, had already been applied. There remained nothing further to be done to effect this object. The conspiracy was therefore ended.

Held, that the court erred in receiving proof of the dying declarations of the deceased. Such evidence is admissible, in case of homicide, only where the death of the deceased is the subject of the charge, and the circumstances of the death are the subject of the dying declarations. This is the settled rule. The crime charged in this case was not homicide in any degree.

Samuel A. Bowen, district attorney, for the people.

J. A. Lynes, for the defendant.

GROVER, J. The indictment charged the commission of the crime at the town of Brookfield, in the county of Madison, and within 500 yards of the boundary line between the county of Otsego and the county of Madison. The counsel for the accused moved to quash it because the crime was not charged to have been committed in the county of Otsego. This was properly denied by the court. Section 45 (2 R. S., p. 727), provides that when an offence shall be committed on the boundary of two counties, or within five hundred yards of such boundary, an indictment for the same may be found and a trial and conviction thereon may be had in either of such counties. The counsel for the accused insists that, notwithstanding, the indictment should charge the commission of the offence in the county in which it is found. This is error. It is sufficient that it shows jurisdiction in the grand jury by which the indictment is found, over the offence, and the jurisdiction of the trial court to hear and determine it. This is shown by the indictment in this case.

The motion in arrest of judgment was properly denied. This was based upon an alleged defect in the third count. But the verdict was general, finding the accused guilty upon all the counts. The indictment contains two counts confessedly good. It is sufficient if it contains one good count. This will sustain the conviction, irrespective of other defective counts.

The counsel for the prisoner also excepted to the denial of his motion to quash the third count, or to compel the prosecutor to elect upon which offence therein charged he would proceed.

The denial of this motion was not the proper subject of an exception. The accused has not a legal right to have the sufficiency of an indictment, or of any count therein, determined upon motion to quash or set it aside; to put the prosecutor to an election, when more than one offence is charged, upon which he will proceed. It is in the discretion of the court whether or not to set aside a defective indictment upon motion; and unless the question is free from doubt the court ought not to do it, but leave the counsel to his demurrer, or motion in arrest of judgment.

But it may be well to determine the sufficiency of this

count, as upon a re-trial the question may be raised in a form requiring its determination.

The objection made to this count is duplicity, in that it charges two distinct offences—the one the wilfully advising and procuring the deceased to submit to the use of an instrument upon her person, with intent to produce her miscarriage; the other wilfully advising and procuring her to take drugs for the like purpose, by means of which the death of the child, of which she was pregnant, and her own death were effected. Section 1, chapter 181, Laws of 1872, provides that any person who shall thereafter wilfully administer to any woman with child, or prescribe for any such woman, or advise or procure her to take any medicine, etc., or shall use and employ or advise or procure her to submit to the use and employment of any instrument or other means whatever, with intent thereby to produce the miscarriage of any such woman, unless, etc., shall, in case the death of such woman or of such child be thereby produced, be deemed guilty of a felony, etc. It will be seen that the count charges the use of different prohibited means to perpetrate the crime, the miscarriage of the woman; and in consequence of some one or all, that the death of the child and woman were effected; charging all as constituting a single felony. The law sanctions this mode of pleading in criminal cases. (1 Bishop's Crim. Pro., 392; id., 436.)

The counsel for the accused excepted to the ruling of the court admitting evidence of the statement of the deceased, in the absence of the accused, as to what was done at the doctor's office upon the occasion of a ride she took with him. This ruling is sought to be sustained upon the ground, first, that it was part of the *res gestæ*; and second, that it was competent as the act or declaration of a co-conspirator, while engaged in the purpose of the conspiracy. The case shows that the deceased, in company of the prisoner, left her residence, in his buggy, and was absent several hours; that he brought her back, and she came into the house; that the prisoner did not come in; that immediately after she came in, in answer to inquiries from her step-mother, she made the statement in question, telling what had been done by the doctor at his office, and how he did it, and exhibited certain medicine which she said the doctor gave,

and stated what he told her as to taking it when her pains came on. In this case the thing done, or *res gestæ*, was at the doctor's office in another town; and it is clear that its narration by the deceased was no part of that thing. Anything said accompanying the performance of an act, explanatory thereof or showing its purpose or intention, when material, is competent as a part of the act. (1 Greenleaf's Evidence, 122, §§ 108, 108a, 109 and notes.)

But when the declarations offered are merely narratives of past occurrences, they are incompetent. (Id., § 110.) That is precisely this case. The declarations given in evidence were a mere statement of what had been done at the doctor's office, and not any part of what was then done, and therefore no part of the *res gestæ*. See *Insurance Company v. Mosley* (8 Wallace, 397), where a somewhat elaborate review of the authorities upon this point will be found in the opinions of the judges, and where the doctrine as to what may be regarded as part of the *res gestæ* was certainly carried to its utmost limits by the majority of the court. See the dissenting opinion of CLIFFORD, J., which was concurred in by NELSON, J. The opinion of the majority of the court in that case would not include the statement as part of the *res gestæ* at the doctor's office. The length of time between the act and its subsequent narration by one of the actors I do not regard as material. The question is, did the proposed declaration accompany the act or was it so connected therewith as to constitute a part of it. If so, it is a part of the *res gestæ*, and competent; otherwise, not.

It is insisted that the statement was competent, as being the declaration of a co-conspirator. The evidence was such as to warrant the conclusion that the prisoner and the deceased had agreed or conspired together to procure the miscarriage of the latter; that in the prosecution of this purpose they went away from the residence of the deceased together, in the buggy of the prisoner. The counsel for the prisoner insists that the deceased was not an accomplice but a victim, and cites *Dunn v. The People* in support of the position. This has no bearing upon the question under consideration. Irrespective of the ethical view of the conduct of the woman, section 2 of the statutes makes her highly criminal. The perpetration of the crimes prohibited

by the statute may be the subject of a conspiracy, and the female subject of the acts a co-conspirator. The general rule is, that when sufficient proof of a conspiracy has been given to establish the fact *prima facie* in the opinion of the judge, the acts and declarations of each conspirator in the furtherance of the common object are competent evidence against all. (1 Wharton, 702; 3 Greenleaf's Ev., 94; 1 Taylor's Ev., 527.) But to make the declaration competent it must have been made in the furtherance of the prosecution of the common object, or constitute a part of the *res gestæ* of some act done for that purpose. A mere relation of something already done for the accomplishment of the object of the conspirators is not competent evidence against the others. (1 Taylor's Evidence, 542, § 530.) We have already seen that the statement in question was a mere narration of what had been done. True, she stated that the medicine exhibited was to be taken by her, thereafter, but this was not for the purpose of producing her miscarriage, but to protect her from the danger to be apprehended therefrom. The means to produce the miscarriage, upon the theory of the prosecution, had already been applied. There remained nothing further to be done to effect this object. The conspiracy was therefore ended. Had it been shown that the medicine was to be taken to aid in producing the miscarriage, what was said in respect to it would have been admissible. This was not shown, and the entire statement was inadmissible.

The court also erred in receiving proof of the declarations of the deceased made after she had abandoned all hopes of life. Such evidence is admissible, in cases of homicide, only where the death of the deceased is the subject of the charge, and the circumstances of the death are the subject of the dying declarations. (1 Greenleaf's Ev., § 156, and cases cited in note; *Wilson v. Boerem*, 15 J. R., 286.) This is the settled rule, and it is unnecessary to discuss the reasons upon which it is founded. Applying the rule to this case, the declarations were not admissible. The charge against the prisoner was not homicide in any degree. The crime charged against him is that of persuading the deceased to submit to the use of an instrument upon her person, and to take drugs with the intent to produce her miscarriage — in

consequence of which the death of the child, and her own, were produced. The death of the deceased was not a necessary ingredient of the crime; that of the child was sufficient to make the offence a felony. The act alleged to have been perpetrated by the prisoner was a crime under the third section of the statute, in the absence of the death of the mother or child. Such death only increased the degree of the crime and the punishment to be inflicted.

The order of the General Term, reversing the judgment of the Oyer and Terminer and ordering a new trial, must be affirmed.

All concur, except RAPALLO, J., not voting.

Order affirmed.

COURT OF APPEALS.

NEW YORK, 1874.

THE PEOPLE v. CORBIN.

The prisoner was tried for forging the indorsement of one Talmy Van Amburgh, upon a promissory note. The defence was, that the prisoner was authorized by Van Amburgh to sign his name, and that he made the signature in question in pursuance of that authority. There was a conflict of evidence on this point, and to establish the guilty intent, the prosecution put in evidence a letter of the prisoner to his father-in-law, John R. Ganoung, admitting that he had made a similar use of his name without authority upon other notes. The judge charged the jury, in substance, that the admissions of the prisoner in the letters, of the use of Ganoung's name, they could consider in determining the intent of the prisoner at the time he indorsed Van Amburgh's name. To this an exception was taken by the prisoner.

Held, that the fact that the prisoner made an unauthorized use of Ganoung's name does not tend to show that he criminally indorsed Van Amburgh's name, or that he knew and understood that Van Amburgh's authority had been withdrawn, or that the signature in question was made with a criminal intent. Following *Coleman v. The People*, 55 N. Y., 81; *S. C.*, 1 Cowen's Crim. Rep., 573.

Ferris Jacobs, Jr., district attorney, for people.

W. H. Johnson, for the prisoner.

RAPALLO, J. The Supreme Court granted a new trial in this case for error in the charge of the county judge who presided at the trial of the prisoner, and the people appeal. The indictment was for forging the indorsement of one Talmy Van Amburgh, upon a promissory note. The defence was, that the prisoner was authorized by Van Amburgh to sign his name, and that he made the signature in question in pursuance of that authority. There was proof that the prisoner had had the authority which he claimed, but evidence was adduced on the part of the prosecution tending to show that, before making the indorsement in question, that authority had been revoked. There was a conflict of evidence on this point, and the question of the prisoner's guilt or innocence depended upon the inquiry whether he made the indorsement under the honest belief that he was authorized to do so, or whether he knew at the time, that he had no such authority, and signed Van Amburgh's name with a criminal intent. To establish such intent, the prosecution put in evidence letters written by the prisoner to his father-in-law, John R. Ganoung, the contents of which might fairly be construed as admitting that the prisoner had made a wrongful and unauthorized similar use of Ganoung's name upon other notes. The county judge charged the jury as follows: "While the proof that he has been guilty of other forgeries is not evidence upon which you can convict him of this forgery, yet the proof of other forgeries in connection with this, so far as they are in the case, you have the right to consider in determining what his intentions were at the time this paper was made and uttered. So far, you may consider all that character of evidence in the case in determining the intent at the time this paper was made and uttered." And again, in response to a request of the prisoner's counsel to charge that admissions of wrong done to Ganoung, contained in the letters to Ganoung, were no evidence that the prisoner was guilty of the crime charged in the indictment, the judge charged: "The fact that the defendant is guilty of other forgeries, is no evidence to prove that he committed this forgery. So far as his admissions to Ganoung concede the commission of forgeries against Ganoung, they may be considered by you

in determining what was his intent at the time this note was made and uttered.”

The prisoner's counsel duly objected and excepted to the admission in evidence of the letters to Ganoung, and excepted to the charge that the jury had the right to take into consideration other forgeries, for the purpose of showing the defendant's intent at the time of indorsing the note in question.

We do not pass upon the exception to the admission in evidence of the letters to Ganoung, for the reason that the objection was general to the entire contents of the letters, and some parts of them may have been admissible, but the exception to the charge was, we think, well taken, and justified the granting of a new trial. The cases in which offences other than those charged in the indictment may be proved for the purpose of showing guilty knowledge or intent, are very few, and this, we think, is not one of them. The fact that the prisoner made an unauthorized use of the name of Ganoung, if established, shows that he was morally capable of committing the same offence against Van Amburgh, but does not legitimately tend to show that he did so, or that he knew and understood that Van Amburgh's authority had been withdrawn, or that the signature in question was made with a criminal intent. The cases on this subject are discussed in the case of *Coleman v. The People*, (55 N. Y., 81), and we think the reasons of that case cover the present one.

The judgment of the Supreme Court should be affirmed.

All concur.

Judgment affirmed.

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The judgment of the Supreme Court should be affirmed.

All concur.

Judgment affirmed.

COURT OF APPEALS.

NEW YORK, 1874.

JOHNSON V. THE PEOPLE.

The defendant was convicted of grand larceny after a former conviction for the same crime.

Held, that the former conviction and discharge must be alleged in the indictment, and must be proved on the trial and passed upon by the jury. A more severe penalty is denounced by the statute for a second offence; and all the facts to bring the case within the statute must be established on the trial. The objection that such evidence may affect the prisoner's character has no force when such evidence relates to the issue to be tried.

Held, that, as there was no evidence that the prisoner had been discharged or pardoned, as the statute requires, except by the fact that sufficient time had elapsed to enable the prisoner to serve out his sentence, if the point had been raised in the court below, and decided adversely, following *Wood v. The People*, 1 Cowen's Crim. Rep., 554, the point would have been available.

William F. Howe, for the prisoner.

Benj. K. Phelps, for the people.

CHURCH, Ch. J. The indictment charges larceny, after a former conviction for the same crime. Proof of the former conviction was objected to on the trial, and is claimed to be incompetent upon the ground that it tended to establish bad character by proof of specific acts; which is improper, especially, before the prisoner puts his character in issue.

The former conviction and discharge must be alleged in the indictment, and, upon issue joined, must be proved on the trial and passed upon by the jury. There is no other mode of proving the facts, and this has been the uniform practice in this State. A more severe penalty is denounced by the statute for a second offence; and all the facts to bring the case within the statute must be established on the trial. (2 Car. R., 37.) The objection that the evidence may affect the prisoner's character has no force when such evidence relates to the issue to be tried. Such evidence may be prejudicial to a prisoner as to the second offence, and a case might occur of a conviction upon too slight evidence, through the influence which a previous conviction of a similar offence might exert upon the minds of the jury; but

there is no legal presumption that such a result will ever be produced. An English statute, passed in 1837, requires the principal charge to be first found by the jury, and then authorizes proof of the former conviction to be presented to them ; but we have no such statute.

It is also objected that there was no evidence that the prisoner had been discharged or pardoned, as the statute requires, except by the fact that sufficient time had elapsed to enable the prisoner to serve out his sentence. This we held to be insufficient in the recent case of *Wood v. The People*, 1 Cowen's Crim. Rep., 554 ; but the point is not available because it was not taken on the trial. The attention of the court should have been called to the question, and, if decided adversely, an exception taken. If this had been done the prosecution might have supplied the proof.

As no error in law was committed, the judgment must be affirmed.

All concur.

Judgment affirmed.

NOTE. — The Penal Code takes the place of the statute in force at the time of this decision, and second offences are now prosecuted and punished according to its provisions. The sections of the Code are as follows :

"§ 688. A person who, after having been convicted within this State of a felony, or an attempt to commit a felony, or of petty larceny, or, under the laws of any other State, government or country, of a crime which, if committed within this State, would be a felony, commits any crime within this State, is punishable, upon conviction of such second offence, as follows :

1. If the subsequent crime is such that, upon a first conviction, the offender might be punished, in the discretion of the court, by imprisonment for life, he must be sentenced to imprisonment in a State prison for life ;

2. If the subsequent crime is such that, upon a first conviction, the offender would be punishable by imprisonment for any term less than his natural life, then such person must be sentenced to imprisonment for a term not less than the longest term, nor more than twice the longest term, prescribed upon the first conviction.

"§ 689. A person, who, having been convicted within this State of a misdemeanor, afterwards commits and is convicted of a felony, must be sentenced to imprisonment for the longest term prescribed for the punishment upon a first conviction for the felony." Ed.

COURT OF APPEALS.

NEW YORK, 1874.

MONGEON V. THE PEOPLE.

The prisoner was indicted on the 24th of April, 1872, for the crime of manslaughter in the second degree. The indictment charged the commission of the crime on the 15th of March, 1872, and he was tried on the 24th of April, 1872, and found guilty.

The General Term held that the act of 1869, under which the prisoner was indicted, was repealed by section 1 of chap. 181, Laws of 1872, but such provision continued in force, as to offences committed prior to the taking effect of the repealing statute, by the saving clause in the general repealing act of 1828. (§ 6, chap. 21, Laws of 1828-1829.)

Held, that the act of 1869 is not repealed in terms or by express reference, and it is not repealed by implication, unless the two statutes are manifestly repugnant and inconsistent, or the later statute covers the whole subject-matter and was intended as a substitute for the former. The law of 1869 ceased to be operative upon offences committed after the 6th of April, 1872, the time at which the later act became a law. The two acts making different and incompatible provisions in respect to the same subject they could not both stand, and the earlier act was abrogated as to all future offences.

Held, that the act of 1872 did not deal with past offences or affect to do so; and as to them there was and could be no inconsistency or repugnancy between the two acts, but each could have full effect — the one as to offences prior to the 6th of April, 1872, and the other to offences thereafter committed.

Held, that the general rule is that laws, whether civil or criminal, are prospective, and not retroactive in their operation and effect, and the laws relating to crimes and their punishment cannot be made to retroact; and if the attempt is made by law to punish an act, already committed, which was not a crime when committed, or to subject an offence already committed to a new or additional punishment, the law will be void, as *ex post facto*.

Held, that, if the act of 1872 had been general in its terms, and covered the whole subject-matter of the former statute, and had not, in terms, been restricted to offences thereafter committed, it might have operated as a repeal, by implication, of the old law, but a repeal of a statute by implication is not favored, and is only allowed when the inconsistency and repugnancy of the two acts are plain and unavoidable.

B. H. Varey, for prisoner.

L. W. Russell, for the people.

ALLEN, J. The act of 1869 (Laws of 1869, chap. 631) declares that any person committing the offence of which the

plaintiff in error was charged shall, upon conviction, be deemed guilty of manslaughter in the second degree; and the statutory punishment for that offence is imprisonment in a State prison not less than four and not more seven years. (2 R. S., 662, § 20.) The act of 1872 (Laws of 1872, chap. 181) declares that any person that shall thereafter commit the same offence shall, upon conviction, be deemed guilty of a felony, and punished by imprisonment in a State prison for a term not less than four years or more than twenty years, and repeals all acts and parts of acts inconsistent with it. The act of 1869 is not repealed in terms or by express reference, and it is not repealed by implication, unless the two statutes are manifestly repugnant and inconsistent, or the later statute covers the whole subject-matter and was intended as a substitute for the former. The law of 1869 ceased to be operative upon offences committed after the 6th of April, 1872, the time at which the later act became a law. The two acts making different and incompatible provisions in respect to the same subject they could not both stand, and the earlier act was abrogated as to all future offences. (*Norris v. Crocker*, 13 How. [U.S.] R., 429.) But the act of 1872 did not deal with past offences or affect to do so; and as to them there was and could be no inconsistency or repugnancy between the two acts, but each could have full effect — the one as to offences prior to the 6th of April, 1872, and the other to offences thereafter committed. The general rule is that laws, whether civil or criminal, are prospective, and not retroactive in their operation and effect. (*Dash v. Van Kleeck*, 7 J. R., 477.) Laws relating to crimes and their punishment cannot be made to retroact; and if the attempt is made by law to punish an act, already committed, which was not a crime when committed, or to subject an offence already committed to a new or additional punishment, the law will be void, as *ex post facto*. (*Hartung v. People*, 22 N. Y., 95.) If the act of 1872 had been general in its terms, and, in the language of Judge CATRON, in *Norris v. Crocker* (*supra*), "Covered the whole subject-matter of the former statute," and had not, in terms, been restricted to offences thereafter committed, it might have operated as a repeal, by implication, of the old law. But a repeal of a statute by implication is not favored, and is only allowed when the in-

consistency and repugnancy of the two acts are plain and unavoidable. (*Bowen v. Lease*, 5 Hill, 221; *McCartee v. Orphan Asylum*, 9 Cow. R., 437.) In case of such repugnancy, the later act stands as the last expression of the legislative will. The legislature, in the enactment of the law of 1872, were unusually cautious, and have so framed the first section of the act, which alone is in apparent conflict with the act under which the plaintiff in error was convicted, that the intent not to interfere with any previous statute, so far as past offences were concerned, and only to provide for future cases, is very apparent. In this, as in other matters, the intent of the legislature must prevail, and a statute will not be deemed to have been repealed by a later statute, if the two are not clearly repugnant, unless the intent to repeal is clearly indicated. (*Smith v. People*, 47 N. Y., 330.) A subsequent act of Parliament will control the provisions of a prior statute if it were intended to have that operation; but when the intention of the legislature is apparent that the subsequent act shall not so operate, then, even though the words of such statute taken strictly and grammatically would repeal a former act, it will not receive such a construction. (Per Lord KENYON, *Williams v. Pritchard*, 4 T. R., 2.)

The first section of the act of 1872, in terms, only declares the offence and prescribes the punishment of those who shall thereafter do the acts therein mentioned. If the same section had expressly declared that persons theretofore guilty of the same acts should be punished as before then provided by law, notwithstanding the passage of this act, the intention of the legislature not to repeal or interfere with the operation of the former statute, as applied to offences before then committed, would be no more apparent than is a like intent from the terms of the act as framed, and within the recognized rule that one statute will only operate as a repeal of a former statute to the extent that the two are repugnant; the act of 1869 is only repealed and made inoperative as to offences committed after the enactment of the subsequent law.

The rule is well stated by Judge McLEAN in *Daviess v. Fairbairn* (3 How. [U.S.] R., 636), that when both statutes are affirmative such parts of a prior statute as may be incor-

porated into the subsequent one, are consistent with it, must be considered in force. There is nothing incongruous in distinct statutory enactments providing for different punishment of the same offence, when committed at different periods of time. A statute is never to be construed against the plain and obvious dictates of reason. Public attention had been called to the particular crime denounced by the acts under consideration, and the necessity of some changes in the existing law ; and it cannot be presumed that the legislature was ignorant or unmindful of the danger of meddling with existing law for the punishment of crime, by any legislation which might prevent the punishment of offences already committed. *Hartung v. People* (22 N. Y., 95), was still fresh in the recollection of legislators, in which it was held that by a change in the law defining the crime and providing for the punishment of murder — effected by an amendment of the prior law instead of, as in this case, by a new statute applicable only to future offences — the prior law had been abrogated, and persons, although convicted under it, could not be punished. The plaintiff in error had been convicted of the crime of murder, and the conviction affirmed on error in the Supreme Court prior to the enactment of the amendatory statute, and this court, on error brought, determined all the exceptions against the prisoner, but held that the judgment was erroneous, because at the time the decision was pronounced in this court there was not any law which authorized or sustained it, or warranted its execution. The legislature, in the statute under consideration, carefully avoided the blunder then made, and the legislation in the two cases is clearly distinguishable as indicating opposite intentions of the legislature. The act of 1872 is only intended as a substitute for the act of 1869 in respect to offences committed after it became a law, and only operates as a repeal of the prior act to the extent that it is a substitute for it.

We are of opinion that the learned court below were in error in supposing that the statute of 1869 was saved, or the punishment decreed by it continued by force of the act of December 10, 1828, entitled “An act to repeal certain acts and parts of acts.” That act repealed certain acts and parts of acts by distinct reference to them, the repeal to become

operative at the time the Revised Statutes upon the same subjects were, by another law passed on the same day, to take effect ; and the subsequent sections of the act related solely to the acts so repealed and the effect of the Revised Statutes then adopted upon the penalties, punishments and proceedings under the repealed statutes, and had no respect to subsequent legislation. The legislature could not declare in advance the intent of subsequent legislatures or the effect of subsequent legislation upon existing statutes.

But the statute of 1869 and the penalties prescribed for past offences were saved by the clearly expressed intent of the legislature not to repeal or abrogate them by the change of the law in 1872, and the judgment must be affirmed.

All concur.

Judgment affirmed.

COURT OF APPEALS.

NEW YORK, 1859.

THE PEOPLE V. DIBBLE.

The prisoner was indicted and convicted of forgery, in passing a counterfeit bill on the Westfield Bank.

Held, that the conviction was error. The admission of evidence to show that the prisoner had passed two bills some two or three days after the transaction for which he was on trial, without showing they were of the same bank, as the one in question, nor even that they were counterfeits, had no legal bearing upon the issue which was on trial.

COMSTOCK, J. The conduct of the prisoner in passing the two bills to the peddlers in exchange for rings, was no doubt suspicious. But those transactions do not appear to have any connection with the alleged offence for which he was indicted. The two bills were passed to the peddlers some two or three days after the transaction for which he was upon trial. It was not shown that the bills were of the same bank as the one in question, nor even that they were counterfeits. One of them was returned to him as bad, whether as uncurrent or as counterfeit, does not appear. He received

it back, alleging that he took it for a good bill. This circumstance does not prove that it was a counterfeit, much less that the prisoner knew such was the fact. We think, therefore, that these transactions were merely calculated to excite suspicion and prejudice against the prisoner, and had no legal bearing upon the issue which was on trial.

It is true the prisoner, some three or four days before the dealing with the peddlers, said he had no money. This circumstance only suggests a doubt whether he came honestly by the bills which he is proved to have had so soon afterward; but it does not connect these bills, or the uttering of them, with the particular offence for which he was tried.

We think the Supreme Court were right in granting a new trial.

Order affirmed.

COURT OF APPEALS.

NEW YORK, 1874.

WOODS v. THE PEOPLE.

The defendant was convicted of rape. The prisoner with two companions visited the complainant at her rooms, and while there, and at that time, Mrs. Milleay the prosecutrix testified, that he committed the crime of rape upon her. Upon the trial the prisoner offered to prove by seven witnesses that the complainant was in the habit of receiving men there for the purpose of promiscuous intercourse, and for liquor especially. This evidence was objected to by the prosecution and rejected by the court.

Held, that the question was whether the accused ravished the prosecutrix by force, or whether she assented to such intercourse. Upon this issue all the authorities concur in holding that evidence showing that the character of the prosecutrix for chastity was bad, is competent, and this for the reason that it is more probable that an unchaste woman assented to such intercourse than one of strict virtue. The evidence is received upon this ground and not for the purpose of impeaching the general credibility of the witness. Evidence showing that the prosecutrix has on a previous occasion had connection with the accused is competent, and this for the reason that having done this shows a probability that she did not resist but consented to the act charged in the indictment.

William F. Kintzing, for prisoner.

Benjamin K. Phelps, district attorney, for the people.

GROVER, J. Upon the trial the prisoner offered to prove by seven witnesses that the complainant was in the habit of receiving men there for the purpose of promiscuous intercourse, and for liquor especially. This evidence was objected to by the prosecution and rejected by the court, to which an exception was taken by the counsel for the prisoner. The evidence previously given shows that the place intended by the offer, where she was in the habit of receiving men for the purpose specified, was where she dwelt, known as "the Ranch," and that the liquor especially was intended to include the practice of the men so going there of taking liquor with them, of which the complainant partook to great excess during such visits.

Upon the assumption that the plaintiff in error had intercourse with the complainant, as to which the testimony was conflicting, the further issue was whether he ravished her by force, or whether she assented to such intercourse. Upon this issue all the authorities concur in holding that evidence showing that the character of the prosecutrix for chastity was bad is competent, and this for the reason that it is more probable that an unchaste woman assented to such intercourse than one of strict virtue. The evidence is received upon this ground and not for the purpose of impeaching the general credibility of the witness. Evidence showing that the prosecutrix had on a previous occasion had connection with the accused is competent, and this for the reason that having done this shows a probability that she did not resist but consented to that charged in the indictment. In *Rex v. Barker* (14 English Common Law, 467) it was held that the prosecutrix might be asked, with a view to contradict her, whether she was not on a specified day after the alleged offence walking on High street, Oxford, looking out for men, and the further question whether upon another specified day after the alleged offence she was not walking in High street with a woman reputed to be a common prostitute. This evidence was competent, not for the purpose of impeaching the general credibility of the witness, but proper for the consideration of the jury upon the question whether she assented to the intercourse with the prisoner. Under these authorities it is entirely clear that the evidence offered by the accused was competent. The

number of witnesses by whom he proposed to prove the fact was immaterial. It was competent for him to prove, by any one knowing the fact, that the prosecutrix was in the habit of receiving men at her dwelling for promiscuous intercourse with them, and the weight of such testimony was in no respect impaired by the fact that the men so received took liquor with them on these occasions, of which they and she partook to great excess. The testimony offered, if true, would have shown the complainant to be a common prostitute; proof more satisfactory than that of a bad general reputation for chastity. The trial court, as well as the General Term, regarded the offer as nothing more than that of proof of some particular acts of lewdness. But it was much more. It was an offer to show by direct evidence not only this, but that the complainant was a common prostitute and in the habit of plying her vocation at the place where she dwelt. Whether evidence of particular acts of criminality by the prosecutrix is competent, is a question upon which the authorities differ, but one not necessary to determine in this case. In *The People v. Abbot* (19 Wendell, 192) such proof was held to be admissible. In *The People v. Jackson* (3 Parker's Cr. Reports) it was held incompetent. The authorities are all cited and ably examined in the opinions in these cases by COWEN, J., in the former, and by S. B. STRONG, J., in the latter. (See also Roscoe's Criminal Evidence, 810.) When a determination of this question by this court shall be necessary to a disposition of the case before it, it will be considered and decided.

The judgment appealed from must be reversed and a new trial ordered.

All concur.

Judgment reversed.

COURT OF APPEALS.

NEW YORK, 1860.

CONKEY V. THE PEOPLE.

Conkey and Harrington were indicted for rape. The indictment stated that it was found by *twenty-four* grand jurors. It charged in first count rape against both; in second Conkey with rape, and Harrington with abetting him; in third both with assault with intent to commit rape. The district attorney was allowed to prove under objection that immediately after the offence was committed, Conkey overturned the stove, broke windows and threw articles out of the room.

The court allowed the prosecution to prove by the prosecutrix that on the day of the rape that she told one Edwards of the crime, and she added "I did not tell him all that was done. I told him they had abused me." On cross-examination she swore, "I did not tell Conkey had had connection with me. I told him the rest they had done." The prosecutrix's husband was allowed to testify: "I first told Mr. Edwards of what had happened Sunday morning. I did not tell him about Conkey getting on the bed, but my wife did. She said they abused her so she could not help about putting up the stove." Medbury, for defendant, testified: "I think I know how she is regarded in New Berlin by some of the people." He was then asked: "From the speech of people, is her character good or bad?" The question was excluded. He further swore, "I don't know how she is generally regarded in the community." Cady was called for prosecution who swore, "I think I have heard enough to form an opinion of her character. In my own mind her character is good. I know the impression of the community is, her character is good." Nehemiah Hill first swore that he did not know that he had the means of knowing about her character for chastity but added, "I think I am prepared to judge," and swore that he considered her character good. The verdict of the jury was, "That they find the prisoners at the bar guilty of the offence charged in the indictment."

Held, that the evidence of the conduct of the prisoner, Conkey, immediately after the perpetration of the offence, was properly admitted. It characterized the whole transaction, showing that the carnal knowledge which was had was effected under violence and threats, calculated to terrify and alarm the prosecutrix; the whole was one continuous act.

Held, that the disclosure made by the prosecutrix upon the first opportunity after the commission of the crime of rape, and the apparent state of mind of the party suffering from the injury, are always regarded as very material, and the forbearance to mention for a considerable length of time the circumstances of the occurrence is a reason for imputing fabrication to the accusation.

Held, that the admission of the testimony of the husband of the prosecutrix, that his wife had complained the next morning to one Edwards, in his presence, of the manner in which the defendant had abused her was not error.

Held, that on the trial of a person charged with rape, the character of the prosecutrix for chastity may be impeached by general evidence as to what is generally said of the person by those among whom the witness dwells, or with whom he is chiefly conversant, for it is this only that constitutes general reputation or character.

Held, that where a general verdict of guilty is rendered, upon several counts in an indictment, relating to the same transaction, the practice is to pass judgment on the highest grade of offence.

Held, that, although the indictment appears upon its face to have been presented by the oaths of *twenty-four* grand jurymen, notwithstanding the statute provides "there shall not be more than *twenty-three*, nor less than sixteen persons sworn on any grand jury," yet as *all* of the grand jury concurred in the finding the defendants suffered no injustice even if one more jurymen was added to the statutory number; beside, as the defendants did not make the objection at the Oyer, it is too late to set up the objection after conviction and sentence. The error complained of does not amount to making a nullity of the indictment; it, at most, is an irregularity, not capable now of avoiding the conviction.

Rexford & Kingsley, for prisoners.

E. Countryman, district attorney, for the people.

CLERKE, J. The evidence of the conduct of the prisoner, immediately after the perpetration of the offence, was properly admitted. It characterized the whole transaction, showing, or tending to show, that the carnal knowledge which he had of the woman was effected under circumstances of violence and threats, calculated to alarm and terrify her. The whole was one continuous act.

Nothing is better established than that the prosecutrix, in trials of this nature, may testify as to what she did or said after the commission of the offence. In the language of Sir WILLIAM EVANS, 2 Pothier Ev. 289:

"Upon accusations for rape, where the forbearance to mention the circumstances for a considerable length of time is, in itself, a reason for imputing fabrication, unless repelled by other considerations, the disclosure made upon the first proper opportunity after its commission, and the apparent state of mind of the party who has suffered the injury, are always regarded as very material; and the evidence of them is certainly admitted without objection."

Ordinarily, doubtless, what a witness has said out of court cannot be received to fortify his testimony. The principal exception is stated in the above quotation.

Thomas Scote, the husband of the woman on whom the offence has been committed, testified that he first told Edwards the next morning, relating no part of his story to Edwards, and then corroborated the statement of his wife, that *she* had complained to Edwards of the manner in which the defendant had abused her. Considering the relation he bore to the prosecutrix; that he was present when she made the disclosure to Edwards; and that he did not give the details of the conversation with the latter; his evidence on this point can scarcely be within the rule disallowing proof of declarations made by a witness out of court, in corroboration of his main testimony at the trial.

Undoubtedly, on the trial of a person charged with rape, the character of the prosecutrix for chastity may be impeached by general evidence. Medbury, a witness called for the defendants, testified that he had heard three or four people in New Berlin speak of Mrs. Scote's character for chastity, but did not pretend to know anything of what the people in her neighborhood said. Cady, a witness called on behalf of the people, and living in her neighborhood, testified that he had heard enough to form an opinion, and he knew that the impression of the community was, that her character was good.

The witness must be able to state what is generally said of the person by those among whom he (such person) dwells, or with whom he is chiefly conversant, for it is this only that constitutes general reputation or character. I think, therefore, that the testimony of Medbury was properly rejected, and that of Cady properly admitted.

Nehemiah Hill, living in the neighborhood of Scote and his wife, first said that he did not know that he had the means of knowing about her character for chastity, but soon after added, "I think I am prepared to judge," and concluded by saying that he thought her character good. The defendant's counsel did not cross examine him relative to the grounds upon which, after first hesitating, he stated he was prepared to testify. We are not to presume that he was not prepared to judge, from being convinced, on further consideration, that he had sufficient knowledge of her reputation among her neighbors.

The jury, at the trial of the indictment, found the following verdict: "That they find the prisoners at the bar *guilty of the offence charged in the indictment.*" The charges in the indictment are: 1st. Rape, against Conkey and Harrington. 2d. Rape, against Conkey, and against Harrington for assisting Conkey in committing a rape. 3d. Assault and battery, against both Conkey and Harrington, with intent to commit rape.

It is maintained by the counsel for the defendants that the jury have found the prisoners guilty of every one of these offences, without specifying which; and, therefore, that the verdict is fatally defective.

Although this is not the usual way of rendering a verdict in criminal cases, I can discover no substantial difference between it and the ordinary verdict of guilty. Like the ordinary form, it responds in general terms to the indictment, and this constitutes what is termed a general verdict. If the usual verdict of guilty was the form entered in this case, it would not be pretended that the jury might have intended to find the prisoners guilty of the mere attempt at an offence. When a general verdict of guilty is rendered, upon several counts in an indictment, relating to the same transaction, the practice is to pass judgment on the highest grade of offence. Whart. Cr. L., p. 1037, § 3048; *Harmon v. The Commonwealth*, 12 Serg. & R., 191. The verdict is to have a reasonable intendment, and it would be far from reasonable to say, if the jury intended to declare the prisoners guilty of only the inferior grade of the offence charged, that they have not said so, and would not specifically find them guilty of it. To relieve them from the consequences of the higher grade, the jury would unquestionably have employed language expressing that intention, and would have limited their finding to the inferior grade.

The indictment appears on its face to have been presented by the oaths of *twenty-four* good and lawful men, the grand jury of the county; although the statute provides "there shall not be more than twenty-three, nor less than sixteen persons sworn on any grand jury." No indictment can be found without the concurrence of at least twelve grand jurors; thus requiring that at least a majority of the twenty-three should unite in the finding. In the present case, not

only twelve, but twenty-three jurors, summoned as grand jurors, united in finding the indictment; the only error committed was that one more added his suffrage to that of the necessary number. The defendants suffered no injustice from this; it was an imperfection in a matter of form, which did not tend to the prejudice of the defendants; there was a concurrence, in the indictment, of more than the law requires.

At all events, it is now too late to make the objection. The counsel for the defendants neglected to make it before the Court of Oyer and Terminer; and it is too late to set up the objection after conviction and sentence. *People v. Griffin*, 2 Barb., 427. In *King v. Marsh*, 1 Neville & P., 187; 6 Ad. & E., 236; 6 Benn. & H. Lead. Cr. Cas., 317; it was held that, a grand jury ought not to consist of more than twenty-three persons. Where more than twenty-three persons are sworn and sit upon a grand jury, and a bill of indictment is found by them, to which the defendant pleads and is tried, and found guilty, the Court of King's Bench will not, upon *motion*, quash the indictment. If more than twenty-three are sworn and sit upon the grand jury, the defendant, in an indictment found by them, may, if that fact appears upon the caption of the indictment, bring error in law. If it does not appear there, then he may bring error in fact. See also *People v. King*, 2 Cai., 98. The error complained of does not amount to making a nullity of the indictment; it, at most, is an irregularity, not capable now of avoiding the conviction.

The judgment of the Supreme Court should be affirmed.

Judgment affirmed.

COURT OF APPEALS.

NEW YORK, 1873.

BOYCE v. THE PEOPLE.

Memoranda.

THE plaintiff in error was indicted, under the act making seduction a crime (Chap. 111, Laws of 1848), for seduction under promise of marriage. The promise, as sworn to by the prosecutrix, was a conditional one that the accused would marry her if she would consent to an illicit connection with him; and that, relying on the promise, she consented. *Held*, that this was sufficient to bring the case within the statute. (*Kenyon v. The People*, 26 N. Y., 203.)

The prosecutrix also testified that the accused, to induce her to consent to his proposal, stated in substance, that he never would marry a girl unless he was satisfied she was a virgin, which he would ascertain only by her assenting to his proposition. But upon her expressing apprehension that he would leave her if she yielded to him, he assured her, in the strongest terms, that he would marry her. The prisoner's counsel asked the court to charge in substance, that if the promise to marry was not an existing one, but an inchoate proposition depending upon the result of illicit intercourse as furnishing evidence of virtue to complete the mutuality of the contract, the case was not within the statute. The court declined so to charge. *Held* (*Church, Ch. J.*, and *Rapallo, J.*, dissenting), no error, as there was no just foundation in the evidence to claim that the promise was to marry only in case the accused should be satisfied that the prosecutrix was a virgin; that it was to the promise and not to any test of virginity that she gave her consent.

The time of the alleged seduction was February 5, 1871, followed by subsequent intercourse down to August, of the same year. It was proved, without objection, that the prosecutrix was delivered of a child February 10, 1872. The prosecution disclaimed any reliance upon this fact as corroborating the evidence of the prosecutrix; the court held the evidence immaterial.

The prisoner's counsel offered evidence that between the 5th of February and the 1st of May, 1871, the prosecutrix had carnal connection with another man, which was excluded. *Held* (*Church, Ch. J.*, and *Rapallo, J.*, dissenting), no error; that pregnancy was not essential to the consummation of the offence charged; that the evi-

dence rejected could only have been material to obviate the effect of that fact as corroborative evidence, and, as that was expressly disavowed, the rejection was proper. Also, that the rejection could be sustained upon the ground that the offer was not limited to show any illicit intercourse at a time when the child could have been begotten, and was in effect simply to show that after the alleged seduction she had been guilty of fornication with another person, which was clearly incompetent. The prisoner's counsel then asked to have the evidence, as to the birth of the child, stricken out, which was denied. *Held*, no error; that as it was received without objection, and the right to use it in support of the charge was disclaimed, there was no strict right to have it formally stricken out.

The prisoner's counsel also claimed that the prosecutrix was not supported by other evidence, as required by the statute. Other evidence was given that she was alone with the prisoner at the time she charged the offence was committed, also as to her condition and appearance after it, as to his attentions and familiarities, and as to his solicitude during her sickness immediately following the alleged offence. *Held*, that the statute did not require direct or positive corroborative evidence as to any of the material facts, but rather such evidence as has been ordinarily required in corroboration of the evidence of an accomplice when called as a witness against his confederates in crime, or circumstances usually relied upon as tending to prove the material facts, and which from the nature of the case are susceptible of being proved, to satisfy the jury that the principal witness is worthy of credit; that, from the peculiar character of the offence, circumstantial evidence only can, save in rare instances, be adduced, other than from the parties concerned, and to require more would be to render the statute mere *brutum fulmen*; and that the corroborative evidence was sufficient to meet the requirements of the statute.

It was also claimed by the prisoner's counsel that the charge of the court was an appeal to the passions and prejudices of the jury, and not cool and dispassionate as it should be. *Held*, that if the claim was well founded it could not avail here; that, if no legal error was committed in the submission of the cause, the judgment would not be reversed, and that legal error could not be predicated upon comments of the court upon the evidence.

Nathaniel C. Moak, for the plaintiff in error.

I. C. Ormsby, district attorney, for the defendants in error.

Allen, J., reads for affirmance; all concur, except *Church, Ch. J.*, and *Rapallo, J.*, dissenting.

COURT OF APPEALS.

NEW YORK, 1874.

HIGGINS v. THE PEOPLE.

The prisoner was indicted, tried and convicted, for the crime of rape.

On the trial, the court was asked to charge "If the jury believe the prosecuting witness did not make prompt disclosure of the alleged wrong it is a circumstance against her, casting a great discredit on her testimony and tends strongly to disprove the truth of the accusation." The court so refused to charge and an exception was taken.

Held, that the proposition, although quite general and somewhat vague, is substantially correct. The request had no pertinency to the facts of the case, as there were no grounds for saying that the disclosure was not sufficiently prompt. The rule does not require it to be made to the first person who happens to be seen. The rule is founded upon the laws of human nature, which induce a female outraged to complain at the first opportunity, and any considerable delay on the part of a prosecutrix to make complaint of the outrage constituting the crime of rape, is a circumstance of more or less weight, depending upon the other surrounding circumstances. A want of suitable opportunity, or fear, may sometimes excuse or justify delay.

William F. Howe, for the prisoner.

Benj. K. Phelps, for the people.

CHURCH, Ch. J. The principal point is upon the following request to charge:

"If the jury believe the prosecuting witness did not make prompt disclosure of the alleged wrong, it is a circumstance against her, casting a great discredit on her testimony, and tends strongly to disprove the truth of the accusation." This proposition is doubtless substantially correct, although it is quite general and somewhat vague. Any considerable delay on the part of a prosecutrix to make complaint of the outrage constituting the crime of rape, is a circumstance of more or less weight, depending upon the other surrounding circumstances. There may be many reasons why a failure to make immediate or instant outcry should not discredit the witness. A want of suitable opportunity, or fear, may sometimes excuse or justify a delay. There can be no iron rule on the subject. The law expects and requires that it should be prompt, but there is and can be no particular time specified. The rule is founded upon the laws of human

nature, which induce a female thus outraged to complain at the first opportunity. Such is the natural impulse of an honest female. But if instead of doing this she conceal the injury for any considerable time, it naturally excites suspicion of fraud, and tends to discredit her.

In this case the prosecutrix was an entire stranger in a great city, without a friend or acquaintance, and, if her evidence is to be credited, having lost her baggage she was inveigled into a basement under the promise of recovering it, and there ravished. When she regained the street she met a woman who asked her what the matter was, and a policeman who took her to the station-house, to neither of whom did she state the real nature of the injury which had been inflicted upon her; but a short time after arriving at the station-house she did state the facts to the police captain, and the prisoner was arrested.

The request as to a prompt disclosure had no pertinency to the facts of the case. It was an abstract proposition, which, if entirely accurate, it was not error to refuse. There was no ground for saying that the disclosure was not sufficiently prompt. The rule does not require that it is to be made to the first person who happens to be seen. A proper opportunity must be presented. Excited and frightened as the prosecutrix is shown to have been, it was natural that she should refrain from making any disclosure either to the woman, or even to the policeman, although she did state enough to the latter to induce him to arrest one of the persons supposed to be concerned. The police captain at the station testifies that she was very much excited when she arrived there, and that it required some time to get her in a condition to make an intelligible statement, and that she did make it on the same day and as soon as she was in a condition to do so.

We think that the facts would not warrant the jury in discrediting the witness on the ground of a want of promptness in making the disclosure.

The other points made are not tenable, and are fully answered in the opinion of the court below.

The judgment must be affirmed.

All concur.

Judgment affirmed.

COURT OF APPEALS.

NEW YORK, 1874.

PEOPLE OF THE STATE V. GATES ET AL.

The defendants were appointed Commissioners of Excise of the city of Schenectady within ten days after the passage and under the provisions of the act of 1870, chap. 175, Laws of 1870. On the first day of April, 1873, Dorn, McClyman and Palmer were appointed commissioners by the mayor alone. Defendants claimed that such appointments were invalid, and on that account claimed to hold over.

Held, that the rule of the statute is for the mayor to appoint in all the cities, except New York and Brooklyn, and the provision for the subsequent appointments, was intended to confer the power upon the same officers, and the language should be construed as though it had read, the same officers shall appoint in the manner above described. There is no reasonable doubt of the intent of the legislature. "It is not the words of the law, but the internal sense of it, that makes the law; the letter of the law is the body, the sense and reason of the law is the soul."

CHURCH, Ch. J. The question presented is whether the plaintiffs or defendants are entitled to discharge the duties of commissioners of excise for the city of Schenectady; and this depends upon the construction of section 2, chapter 175 of the Laws of 1870, entitled "An act regulating the sale of intoxicating liquors." On the part of the plaintiffs it is claimed that the mayor, in the first instance, and at the end of every third year thereafter, has the power to appoint excise commissioners for said city, without the co-operation or joint action of the aldermen as a board, or any other board or officer; and that, having received such appointment from the mayor on the first Monday of April, 1873, they are entitled to enter upon the duties of the office.

The defendants were appointed commissioners of excise for said city, by the mayor, within ten days after the passage of the act of 1870, as therein provided and, while conceding that the mayor alone had full authority to make the first appointment of commissioners, they claim that subsequent appointments can only be made by the mayor and board of aldermen, as provided in the act for the cities of New York and Brooklyn; and that, until the new appoint-

ment is made in that manner, they are entitled, under the provisions of the act to hold the office.

It must be confessed that the statute is not as explicit upon the point in question as it should be, and there are plausible reasons for an honest difference of opinion as to its true construction. It is the duty of courts, by the application of established canons, to give the statute a reasonable construction, and one which will, if practicable, carry out the real intent and purpose of the legislature. The primary source of light is the language employed; and the solution of the question will be facilitated by eliminating from the statute everything not relating to the subject of the appointment of these officers and collating its provisions relating thereto; it will then read as follows:

"The mayor of each of the cities, except in the cities of New York and Brooklyn, shall appoint the commissioners of excise in their respective cities, within ten days after the passage of this act, but in the cities of New York and Brooklyn the mayor shall nominate three good and responsible citizens to the board of aldermen of such cities, respectively, who shall confirm or reject such confirmation. * * *

On the first Monday in April, in every third year hereafter, the mayor and board of aldermen shall proceed to appoint, in the manner above described, persons qualified as aforesaid to be such commissioners of excise, in their respective cities for the next three years," etc.

The statute declares that appointments after the first, are to be made by the mayor and board of aldermen "*in the manner above described.*" The only mode before described for the appointment by the mayor and board of aldermen was expressly confined to the cities of New York and Brooklyn; and if the word "manner" refers to that act as claimed by the counsel for the defendants, it might be inferred that the limitation would also restrict such appointments to those two cities; and if so there would be no express power to make appointments, after the first, in any of the cities of the State except in New York and Brooklyn. There are no words expressly extending the provision for subsequent appointments to all the cities of the State, and construing the words "mayor and aldermen" to signify the

same as when first used, and the word "manner" to the mode of appointment in New York and Brooklyn alone, the implication is not destitute of force that no other subsequent appointments were provided for. This would be carrying the defendant's construction of the act to a point which would defeat it; because it is manifest from various provisions of the act, that the legislature intended to provide for all cities in the State. Aside from this I am unable to concur with the counsel for the defendants in his construction of the language of the act. The first appointment is to be made by the mayor in all the cities of the State except New York and Brooklyn; and in those by the mayor and board of aldermen. The provision for the subsequent appointments, it is evident, was intended to confer the power upon the same officers, and the language should be construed as though it had read, the same officers shall appoint in the manner above described. This last clause is to be applied distributively to each mode and not restricted to one; and especially should it not be applied to the exceptional portion of the manner prescribed. The rule of the statute is for the mayor to appoint in all the cities, and the exception applies only to New York and Brooklyn; and we cannot suppose, in referring to it generally, that the intent was to confine it to the exception.

Stress was laid on the singular number being used, as evidence of an intention to confine the subsequent appointments to one only of the modes before described. So the words "the mayor and aldermen," "shall appoint," etc. Strict grammatical rules should not prevail over the manifest sense of the language. In this statute the words "mayor and aldermen" are expressly applied to more than one city; and it is evident that strictness was not observed in this respect. But the word "manner" has a larger signification. The statute provides the manner of appointing excise commissioners in all the cities of the State; and although different modes of appointment are prescribed for different cities, yet the word "manner" when used to denote the scheme of the statute, should be regarded as including all the regulations on the subject for all the cities. The subsequent words "in their respective cities," are significant of the intent here indicated. It is admissible to read these

words in connection with the words "in the manner above described," and regard the intervening words parenthetically. A slight change of punctuation would require such a reading, and the connection is more consonant with accurate expression than a connection with the words immediately preceding. The statute would then read: "The mayor and board of aldermen * * * shall appoint in the manner above described in their respective cities," etc. This would clearly refer to the two modes of appointment before described by the different officers specified. There are other considerations having a legitimate bearing confirmatory of this construction. No reason is perceived for a change in the first and subsequent mode of appointment. The counsel for the defendants suggested that the power was vested in the mayors alone at first, so as to insure an early appointment, but the act provides for the continuance of the old officers until an appointment is made according to the statute; and if a difference was intended in respect to all the other cities of the State, there is no reason why the same difference should not have been extended to New York and Brooklyn.

Another controlling consideration is, that there is no "board of aldermen" in any city of the State except in New York and Brooklyn. There are officers in other cities called aldermen, but they never sit as a "board of aldermen." When acting as a board, whether in conjunction with other officers, as in some of the cities, or by themselves, they are known and recognized as the common council, and in no case as a board of aldermen. It must be presumed that the legislature knew this; and it cannot be supposed that they would vest a power of so much importance upon a body which had and could have no recognized legal existence. It was suggested in answer to this, that this language should be construed to apply to these officers when acting together, and that the word "board" was used in its common acceptation. In many of the cities of the State, the aldermen can exercise no powers as a body, under any name, but are authorized to act as a local governing power only when associated with other officers, as the mayor and recorder.

It would require the plainest language to justify the inference that the legislature intended to confer this single

power upon the aldermen of a city, independent of the legal organization with which they are connected. It is a general rule that when a word has been used in a certain sense in one part of a statute, it is to receive the same meaning when used in other parts, unless a different meaning is in some way indicated.

It is also argued that the legislature did not mean a legally recognized body by the term "board," because in the first section of the act, a "board of trustees" of an incorporated village is mentioned, while the statutes providing for incorporated villages do not use the word "board," but simply "the trustees." I have not examined the statutes, but if this is so, the material distinction exists, that trustees of villages, when acting together as such, are the local governing body, and are properly, when so acting, called a board, while aldermen in many of the cities have no power or authority to act as a body; and it is unreasonable to infer that the legislature intended to organize them into a board, or body, for the exercise of this single power.

We think there is no reasonable doubt of the intent of the legislature; and while the language is not fortunate, no rule of law is violated in construing the statute according to that intent. "It is not the words of the law, but the internal sense of it, that makes the law; the letter of the law is the body, the sense and reason of the law is the soul."

The judgment must be affirmed, but by stipulation, without costs.

All concur.

Judgment affirmed.

COURT OF APPEALS.

NEW YORK, 1874.

WENZLER V. THE PEOPLE.

The prisoner was convicted of petit larceny, by the Court of Special Sessions of the Peace in and for the county of New York. The court of special sessions was held by three persons appointed police justices under the provisions of the act, chap. 538, Laws of 1873.

It is insisted by the counsel for the prisoner that the appointment of police justices is provided for in art. 6, § 18, of the State Constitution, adopted in 1870, in the words: "Justices of the peace and District Court justices shall be elected in the different cities of this State, in such manner, and with such powers, and for such terms, respectively, as shall be prescribed by law."

Held, that among the principles to be applied in the construction of constitutions is the principle, that the makers of such instruments and the people who have adopted them must be deemed to have employed words in their natural sense, and to have intended what they said.

Held, that, applying this principle, there is nothing in the subject-matter or the context either to require or to warrant the court from departing from the plain sense and import of the terms used. By justices of the peace were not meant officers having part only of the authority of justices of the peace—that is, their civil jurisdiction only, but it included their criminal jurisdiction as well.

Held, that police justices in the city of New York are not included by the terms justices of the peace in cities, as used in the section of the Constitution in question, but that those officers may rightfully be appointed, as provided in the act of 1873.

Held, that the title of the act in question expresses that the bill is a local one and that it does not embrace more than one subject; and that all of the provisions of the statute relates to the same subject, and all are essential to work out the legitimate purpose of the law—the securing better administration in the courts mentioned in the act.

Elbridge T. Gerry, for the prisoner.

D. B. Eaton, for the people.

JOHNSON, J. The judgment of the Supreme Court in this cause cannot be affirmed, save upon the basis of the constitutionality of the act of the legislature, entitled, "An act to secure better administration in the police courts of the

city of New York," and being chapter 538, of the Laws of 1873.

The act is assailed upon two grounds, of which, one relates to the extent of the legislative authority, and the other, to the form of its attempted exercise. To maintain the first of these grounds, it is insisted, by the plaintiff in error, that the constitutional provision adopted in 1870 (art. 6, § 18), in these words: "Justices of the peace and District Court justices shall be elected in the different cities of this State, in such manner, and with such powers, and for such terms, respectively, as shall be prescribed by law;" includes the officers styled police justices, whose appointment is provided for by the act in question.

To maintain the second ground, it is insisted that the act in question is in violation of article 3, section 16 of the Constitution, which provides, that "No private or local bill which may be passed by the legislature, shall embrace more than one subject, and that shall be expressed in the title."

If neither of these grounds suffices to establish the unconstitutionality of the act in question, then the judgment must be affirmed.

The first of the questions presented has been discussed at great length, and with infinite research, and much ability, carrying the inquiry as to the history of the office of justice of the peace, and as to its nature and functions, back to the period of its origin in England about the middle of the fourteenth century. Interesting as such inquiries are, we are inclined to think that the meaning of the language employed by the people of this State in 1869, to express their will in respect to their judicial system, does not demand of us to follow this line of examination.

The frequent occasions which the courts of this country have had to ascertain the meaning of the numerous written constitutions which have existed, and yet exist, within the United States, have made familiar the principles of exposition applicable to those instruments. Among these principles, the most obvious is, that the makers of such instruments and the people who have adopted them must be deemed to have employed words in their natural sense,

and to have intended what they said. (*Gibbons v. Ogden*, 9 Wheat., 188.)

Applying this principle to the clause in question, we find that justices of the peace and District Court justices are to be elected in the different cities of the State, but we are not furnished with any definition of the terms employed. An officer named justice of the peace has existed in the State quite from the beginning of the State government. This officer has always been known by that legal designation, and was instituted by that title. Justice of the peace has always been as distinctive a title of an office as the title of justice of the Supreme Court. It is not descriptive of function, but the name of a particular office. It is like the name with which it is coupled in this same clause; "District Court justices." These latter are also named by their title, and not designated by a description of their functions. This is made still clearer by the latter part of the same clause, which directs that the powers of each, and their terms of office, shall be such as shall be prescribed by law, which, of course, leaves their functions to be defined and limited at the will and in the discretion of the legislature. The meaning is made still plainer, both by the clause which precedes, and by that which follows. This is the following clause:

"All other judicial officers in cities * * * shall be chosen by the electors of cities, or appointed by some local authorities thereof."

It describes a class of local judicial officers, and classifies them, not by their functions, but by their locality.

The preceding clause declares that: "Justices of the peace and judges or justices of inferior courts not of record, and their clerks, may be removed," in a specified manner.

In this clause we have one set of officers designated by their specific title, and a grouping of (it may be) many others under a descriptive designation, and not a title of office, as judges or justices of inferior courts not of record. All these considerations point to the conclusion that the terms "justices of the peace," as used in the Constitution, are to be referred to an officer known by that title in law.

At the time this article was adopted, there were, so far as we are advised, no officers entitled "District Court justices,"

except in the city of New York, and in that city there were no officers entitled "justices of the peace," though in some other cities officers of that title existed by law. The clause in question is not to be construed as requiring such officers to be created in every city, but only as providing in respect to them where they did then exist, or might afterwards be established.

The office of police justice had existed in the city of New York for many years anterior to the adoption of the constitutional provision in question. Under that name it was established in 1848 (chap. 153 of the Laws of 1848), and six were to be elected, one in each of the districts hereafter mentioned. The police justices succeeded by that statute to the power and jurisdiction which had previously been vested in officers entitled special justices for preserving the peace in the city of New York, and their jurisdiction was exclusively criminal. By the same act there was established in the city of New York, in each of the six judicial districts into which, by the act, the city was divided, a court "to be called the Justices' Court of the city of New York;" and in each district there was to be elected a justice, to hold the court in said district. These Justices' Courts, and the justices thus elected, succeeded to the jurisdiction which had belonged to officers known as the assistant justices of the city of New York, and to the courts known by the name of the Assistant Justices' Courts, which courts and justices were by the said act abolished. The functions and jurisdiction of these officers were civil entirely. The name of these civil courts was again changed by another act of the same year (chap. 276 of the Laws of 1848), to that of "The Assistant Justices' Courts in the city of New York," and subsequently by a law of 1852 (chap. 324), the name was again changed to that of District Courts, by which name they are mentioned in the constitutional amendment in question.

Now, the office of justice of the peace in the State of New York has always been possessed of two jurisdictions: the one civil, extending to specified actions and limited amounts; the other criminal, conferred by statutes naming them among other officers empowered to preserve the peace and to entertain criminal complaints.

At its origin, in the Colony of New York, under the English government, the criminal jurisdiction was the principal and perhaps exclusive function of the justices of the peace; but at an early day in the Colony, civil jurisdiction was conferred; and always, under the government of this State, the civil jurisdiction has been the most important feature of the office, though the union of both in the same officer has for many years been the rule and the distinguishing characteristic of the office. Thus has it been known to the statute law and to popular usage. The Revised Statutes discriminate between the justices of the Marine Court of the city of New York, the assistant justices of that city, the justices of the Justices' Court in the city of Albany, the justices of the Justices' Court of the city of Hudson, and justices of the peace. (2 R. S., 224, 225; and 267, § 231.) The Code of Procedure, sections 52 to 68 inclusive, preserves the same distinction.

No confusion of terms, no interchangeable use of names in respect to these officers, has ever prevailed. The justice of the peace has been a definite legal entity, and has not been confounded with police justices nor district justices nor assistant justices. Each has been referred to in legislation by the appropriate title, and the name of neither has been used to designate the other.

Under these circumstances I see no reason to think that the provision of the Constitution was intended to mean anything different from what it says. It has employed the definite and certain names of particular and existing offices, justices of the peace and District Court justices; and there is nothing in the subject-matter or the context either to require or to warrant us in departing from the plain sense and import of the terms used. And more, the argument is strong that by justices of the peace were not meant officers who have part only of the authority of justices, inasmuch as District Court justices have their civil jurisdiction, and would have been included under the designation of justices of the peace if those terms bore the sense contended for by the plaintiff in error.

It is suggested that the construction thus far upheld in the judgment appealed from is an evasion of the Constitution, and cases are referred to in which it is said that the

courts will look at the substance of an office named in the Constitution, and will not allow its provisions as to the mode of filling the office to be defeated by giving it a new name. The principle is both sound and salutary, but it has no application to the case before us. Its legitimate application is to cases where the legislature confers upon an office newly created, a new name, coupled with duties belonging to an office in existence, and provided for by constitutional requirements; for instance, an act creating a marshal of a county, to be appointed by the governor and senate, and to perform the duties theretofore performed by the sheriff. Such an act would be an evasion of the Constitution, and it would be rightly held that the office remained unchanged save in name, and could only be filled as the sheriff's office is required to be by the Constitution. Of this class of cases *The People ex rel. Bolton v. Albertson* (55 N. Y., 50) is an example; and many others might be referred to, but they all rest on the same principle. To carry out this principle, a constitutional provision will be construed largely, so as to include all legislative acts within the mischief intended to be prevented. But neither these cases nor the principle involved have any application to a case like the present. Here, police justices existed when the constitutional provision was framed, and then had the same substantial powers as now. All legislation designated them as police justices and not as justices of the peace. The Constitution speaks of justices of the peace and not of police justices. How is it possible to talk of evasion? If we should construe justices of the peace to mean police justices we should attribute to the convention and the people the vice of saying what they did not mean, and introduce a new and dangerous principle of construction. If there had been justices of the peace in New York, exercising the functions of these police justices, when the amended judiciary article was adopted, and if police justices had not then been existing officers, and the legislature had afterward created the office of police justice and altered the mode of selection, that would have been an evasion. (*People v. McKinney*, 52 N. Y., 374.) But the whole foundation is wanting, and such a superstructure rests on nothing.

The case of *Clark v. The People* (26 Wend., 599) does not

conflict with the views stated. The statute there in question authorized the common council of Rochester to appoint a justice of the peace, and the court held that all justices of the peace were excepted from the requirements of the Constitution then in force, that judicial officers (other than such justices) should be appointed by the governor and senate. Some things were said by some of the senators who gave opinions, showing that they thought all the varieties of justices in New York city were justices of the peace. But the judgment does not involve that position, and the whole course of legislation is hostile to it. I do not advert to the argument from what passed in debate in the convention, though, in my opinion, it favors the conclusion I come to. Such arguments, at best, are inconclusive, for they only show the opinions of the speakers; others may have proceeded on quite different grounds. As was well said, on the argument of this case, the distinguished gentlemen whose utterances in debate were invoked upon this question had power neither to settle a construction or make a compromise in respect to the language of the Constitution. It was adopted by the people, and the construction ought to be made upon its language alone, if possible.

We are of opinion, therefore, that police justices in the city of New York are not included by the terms justices of the peace in cities, as used in the section of the Constitution in question, but that those officers may rightfully be appointed, as provided in the act of 1873.

The next question depends upon the effect and applicability of article 3, section 16 of the Constitution, which declares that "No private or local bill which may be passed by the legislature shall embrace more than one subject, and that shall be expressed in the title." The title of the act in question is, "An act to secure better administration in the police courts of the city of New York." The act is, therefore, unquestionably a local act, relating as it does, both by its title and all its provisions, to the city of New York. Although public and not private, in all its provisions, the requirement of the Constitution is, that it shall embrace only one subject, and that this single subject shall be expressed in its title. The title obviously expresses but one subject, and that is the securing of better administration in

the courts named. Now every provision of law which legislative wisdom may regard as conducive to the securing of better administration in these courts may legitimately be put in this act. For otherwise we must say that the legislature is precluded from securing by a single law an object obviously of the first importance in the local administration of justice in the criminal courts of New York. For if provisions of the act, no matter how diverse, have a tendency to produce better administration, then, unless they may be embraced in a title sufficiently general to include them all, they cannot be enacted at all in a single law. If they make two subjects they cannot be united. It is only by regarding them as part of a single scheme, and each part as of equal necessity, and by adopting a title sufficiently general, that the whole project of local legislation can be combined into a single law. Now, upon examining the provisions of the act in question, it is entirely obvious that every part of it is within the legislative power. Its enactments, in substance, are not a usurpation on the part of the legislature. They may be distasteful and may be thought unwise, but they are legislative in character. Nor do I see any ground to say that each provision may not be of that character and bear that relation to every other, that a legislature proceeding on just and public grounds may have thought it unwise that any one provision should become the law, unless each of the others also became the law. In that case all relate to the same subject, for all are essential to work out the legitimate purpose of the law — the securing better administration in the courts mentioned. Of this character are the provisions substituting new officers for the old, and prescribing the duties of these officers as well in the Police Courts as in connection with the Court of Sessions, of which the former officers were also members, and which are the necessary changes to preserve the harmony of the scheme of legislation and to carry out in the needful detail the changes introduced by the act under consideration. Surely no such construction can properly be put upon the constitutional provision in question as to require a single scheme of legislation to be broken up into a series of acts, each of which, without the others, would be regarded as undesirable and ineffectual to accomplish the proposed object. Such a con-

struction would make of the provision in question not a guard against fraudulent, but an obstacle and embarrassment to good legislation. It ought not, as matter of principle, to receive such a construction, and none of the cases require it. Thus in *Sullivan v. The Mayor* (53 N. Y., 652), the act involved was entitled, "An act to make provision for the government of the city of New York." It levied taxes for a great variety of purposes, authorized bonds of various kinds for various purposes, provided for charities, and for schools educating children gratuitously, and prohibited the common council from creating any new office or increasing salaries except as authorized by acts of the legislature. All these provisions were deemed, as being parts of one scheme, to form only one subject, and to be expressed in the title. So it was held in the *Matter of Volkening* (52 N. Y., 650), in respect to "An act relative to contracts by the mayor, etc., of the city of New York." The act, in the first place, regulated contracts on behalf of the city by requiring them to be let to the lowest bidder. It then provided that the power to revise and correct assessment lists, before vested in the common council, should thereafter be vested in the comptroller, corporation counsel and recorder of the city. These provisions were nevertheless held to relate to a single subject, and that, the subject expressed in the title. These cases were deemed by the court so clear in the light of previous discussion, that the judgments themselves were deemed their own sufficient vindication. The previous judgment of the court in *The Matter of Mayer* (50 N. Y., 504), and the full discussion by the chief judge of the principles which ought to govern in the decision of questions arising under this provision of the Constitution, had rendered unnecessary further examination. Within the reasoning of that case, the decisions already cited, and the case now before us, may safely rest.

We are of opinion, therefore, that the law in question is not a violation of the Constitution, and that the judgment of the Supreme Court must be affirmed.

ALLEN, J. (dissenting). The conviction of the plaintiff in error is claimed to be erroneous upon the ground that the

court was not legally constituted, and that the justices holding the same were not duly appointed to their offices.

The law under which the members of the court were appointed to, and claim to hold and enjoy the emoluments of the office of "police justice" of the city of New York (Laws of 1873, chap. 538), and to be authorized to hold the Court of Sessions, is challenged as unconstitutional upon two grounds: First, that the office, the title to which is disputed, is that of a "justice of the peace" and therefore elective, under section 18 of article 6 of the Constitution; second, that the act is local and does not conform to the requirements of section 16 of article 3 of the Constitution, that bills of that character shall embrace but one subject, and that that shall be expressed in the title. The questions presented by these objections lie within a very narrow compass, and do not admit of discussion at great length. They will be considered in the order stated.

First. The Constitution (Art. 6, *supra*,) makes justices of the peace in the several towns elective, and prescribes their terms of office. It also declares that "justices of the peace, and District Court justices, shall be elected in the different cities of this State, in such manner and with such powers, and for such terms, respectively, as shall be prescribed by law;" and that all other judicial officers in cities whose election or appointment is not otherwise provided for in the same article, shall be chosen by the electors of cities, or appointed by some local authorities thereof. At the time of the adoption of this article of the Constitution, in 1870, the jurisdiction exercised by justices of the peace, in the several towns of the State, was divided in the city of New York between "police justices" and "District Court justices," the former having and exercising jurisdiction in criminal matters, and the latter exercising a civil jurisdiction, the powers and jurisdiction of each modified to meet the exigencies of a large city.

Both classes of officers were elective and made so by the Constitution then in force.

The justices holding the court were appointed to the office of "police justices," in the city of New York, by the board of aldermen of the city, upon the nomination of the mayor, pursuant to the law of 1873 (*supra*). If the office is that of

"justice of the peace," it was not competent for the legislature to deprive the electors of the city of the power to elect to it, and to confer power of appointment upon the mayor and aldermen, or other local authority. The office must be judged and its character determined by its duties and functions, and the powers and jurisdiction conferred upon the incumbent rather than by the name and title given to it by the act of its creation. (*People v. Raymond*, 37 N. Y., 428; *Same v. Albertson*, 55 id., 50.) The Constitution does not define the terms used, or declare the functions of the office intended by the terms employed, but adopts the title of an ancient and well known office for that purpose. The intent is manifest to secure to the electors of cities the choice of that class of magistrates whose duties were those of a "justice of the peace," as that office was known at common law and in the judicial history of the State, and that intent cannot be frustrated or the provisions evaded by a verbal change in the name or title. The identity of the office with that mentioned in the Constitution is not destroyed by giving it a different baptismal name in the statute creating or continuing it.

If the magistrates appointed pursuant to the act under consideration are, by reason of their peculiar duties or functions, "justices of the peace" in the common law and historic sense of that title, the Constitution making the office elective applies in all its force, irrespective of the title given to it by statute. (*People v. Albertson*, *supra*.) The descriptive title employed in the Constitution to designate the office was not used in a peculiar or restricted sense, nor is there evidence in or out of the instrument of a design to discriminate against the electors of the city of New York in the matter of choosing justices of the peace, or magistrates who should be specially charged with the duties appertaining at common law to that office. The office of "justice of the peace" is an office of great antiquity, and the jurisdiction of justices of the peace has varied from time to time, depending either upon the terms of their commissions or particular statutes; but at all times they have had ample jurisdiction in all matters concerning the public peace, and from these powers, as conservators of the peace, is derived and taken the descriptive title and name of their office. The

term conservator of the peace and "justices of the peace," are regarded as equivalent, the one for the other. (*Regina v. Bonnet*, 11 Mod., 141.) Those who in respect of some other office have power to keep the peace, as an incident or in addition to their other or general powers of office, have not been called conservators or justices of the peace, but by the name of their respective offices; as in the case of aldermen, or other officers, invested with some or all the powers of justices of the peace, but those who are constituted for the purpose only of keeping the peace and performing the duties assigned in that respect, and in respect to the arrest and punishment of offences, to justices of the peace are called by the name indicative of their peculiar functions, that is, "justices of the peace." (Bac. Abr., Justice of the Peace, A.) A justice of the peace is defined to be "a public officer, invested with judicial powers, for the purpose of preventing breaches of the peace, and bringing to punishment those who have violated the law." (Bouv. Law Dic.) Their common law powers relate exclusively to matters affecting the public peace, and to the arrest and punishment of wrongdoers, and the extent of their jurisdiction in the trial and punishment of offenders is regulated by statute, and has varied, both here and in England, at different times and in different localities. In this State, as in many others, a limited civil jurisdiction is conferred in addition to the criminal jurisdiction, but this has not effected any change in the designation and title of their office, and whether they have the civil jurisdiction or not, they are technically and legally justices of the peace in the common law sense, so long as they have and exercise the common law powers of that class of magistrates in respect of breaches of the peace and criminal offences. (See, also, Burr. Law Dic.; Wheat. Law Dic.; 1 Bl. Com., 351; *Reg. v. Bonnet*, 11 Mod., 141.) A police justice is a magistrate charged exclusively with the duties incident to the common law office of a conservator or justice of the peace, and the prefix "police" serves merely to distinguish them from justices having also civil jurisdiction. The term "police" is ordinarily used in reference to the government of a city or town, but is equally applicable to any other municipal government. A judiciary police is established solely for the preservation of the public peace and

the prevention and punishment of crimes, and a judicial office created for that purpose comes directly within the class of magistrates known in the common law and the judicial history of the State as justices of the peace, and must, under the Constitution, be chosen by the electors of the locality. The jurisdiction of the "police justices" named in the act of 1873 is not prescribed or defined in terms in the act itself, but is declared by reference to prior laws by which the functions, powers and duties of the magistrates for whom substitutes and successors were intended to be provided by the law under consideration were declared and established. The first section of the act declares that "all the powers, authority and duty now appertaining to any police justice in the city of New York, or which may appertain to any such in office under laws heretofore existing, shall belong to and may be exercised and performed by the police justices appointed hereunder respectively, and also by them as members of the board of police justices, and when sitting in the Court of Special Sessions of the Peace, except as hereunder limited." Other parts of the act direct as to the manner in which the jurisdiction thus conferred shall be exercised and provides for the officers and attendants of the court, the order in which the justices shall hold court, and other matters model in their character and constituting the machinery of the organization. After the clause declaring the jurisdiction, all the other provisions of the act have respect only to the exercise of that jurisdiction and are intended to facilitate the performance of the duties devolved upon the justices in regard to the public peace and the arrest and punishment of wrongdoers. A reference to the magistracy and the administrative and judiciary police of the city under the Dutch government, or while it was a part of an English colony, will not aid in the interpretation of the judiciary article engrafted upon the Constitution of the State in 1870. Such a reference will only show, what all know must necessarily have been the case, that at all times and under all forms of government, officers have existed charged with the powers and duties appertaining to the common law office of a justice of the peace. No city government could exist without such a magistracy under some name. From the first organization of the State government there have

been justices of the peace exercising criminal jurisdiction. In 1787, it was enacted that in every county of the State "good and lawful men, of the best reputation, should be commissioned justices to keep the peace;" their jurisdiction was exclusively over crimes and misdemeanors, and similar in extent and the mode of its execution to that exercised by justices of the peace of the several counties of the State from that day to this. By section 10 of the same act, the mayors, recorders, and aldermen of the cities of New York and Albany were clothed with the same powers possessed by justices of the peace in the several counties. (Laws of 1787, chap. 8; 1 Gr. Laws, 297.) There has at all times been magistrates for the trial of civil actions in the city of New York, distinct from those possessing criminal jurisdiction. They have been called sometimes assistant justices, and at times by other titles. (Laws of 1787, chap. 89; 1 Gr. Laws, 445; Laws of 1807, chap. 139; Laws of 1848, p. 249; *id.*, p. 404; Laws of 1852, p. 471.)

In 1798 the police organization of New York was reconstructed and two justices authorized to be appointed, each of whom was to be denominated in his commission a special justice for preserving the peace in the city, and who should, within the said city, execute the like authorities which were, by law, vested in justices as conservators of the peace. (Laws of 1798, chap. 25; Sess. Laws, p. 282.) By the act of June 18, 1812 (6 W. & S. Laws, 539,) it was enacted "that the special justices for preserving the peace in the city of New York and each of them, shall have and exercise the like powers in the said city as are now exercised by justices of the peace in the different counties of this State." The authority to try causes for the recovery of debts was excepted by a special clause, thus making them simply "justices of the peace;" that is, conservators of or justices assigned to keep the peace.

The act of April 9, 1813 (2 R. S., 342), to "reduce such laws relating particularly to the city of New York into one act," increased the number of special justices to three, and re-enacted the provisions of the law of 1812 as to their jurisdiction. (Sess. 22 and 41.) In 1832, 1835 and 1838, the common council of the city of New York were authorized to appoint additional "police or special justices for preserv-

ing the peace of the city," with like powers and to perform the same duties as were then by law conferred upon, or required from, the special justices of the city. (Laws of 1832, chap. 58; Laws of 1835, chap. 151; Laws of 1838, p. 317.) In 1848 the city was divided into six districts, with a justice to be elected having civil jurisdiction in each. (Laws of 1848, chap. 153, § 1.) By the same act (Sec. 7), a "police justice" was required to be elected in each of the districts, who should "have all the powers and perform all the duties of the special justices for preserving the peace in the city of New York." In 1854, and again in 1869, additional judicial districts were constituted in the city of New York, a "civil justice" and a "police justice" authorized to be elected in each, with the same powers as were possessed by the other justices. (Laws of 1854, chap. 65; Laws of 1869, chap. 377.) Other statutes had conferred upon the "police justices" the power to hold Courts of Special Sessions for the trial of certain offences. (Laws of 1857, chap. 446; Laws of 1858, chap. 282; Laws of 1865, chap. 563.) The "police justices," under the act of 1873, succeeded those elected under the act of 1848 and the laws amending the same, and the Constitution of 1846 (art. 6, § 18), making the office elective, and they succeeded to their powers and duties and none other. Those powers and duties were, as appears by this review of the legislation from 1787, merely that of justice of the peace, or conservators of the peace. The legislature have, in effect, incorporated the provisions of the laws of 1798 and 1812 in the act of 1873, and making the "police justices," under the latter act, the lineal successors of the "special justices" of the former laws, have in terms invested them with the "like powers in said city as are exercised by the justices of the peace in the different counties of this State," except in respect to actions for the collection of debts: that is, the jurisdiction of justices of the peace in preserving the public peace, and in the arrest and punishment of wrongdoers, precisely the jurisdiction which distinguishes justices of the peace from other magistrates, gives title and name to their office, and makes it strictly and literally the office declared by the Constitution to be elective. The words "special" or "police" do not affect the character of the office or take it out of the nomenclature of

the Constitution, but rather, in the connection in which they are used, show more clearly that it is the office intended by the framers of the Constitution. Judge Comstock and Mr. Murphy were clearly right in their statements in the convention, that by the article of the Constitution, as finally adopted, the office of police justice would be left precisely where it was. It was elective under the Constitution then in force, and if the amended article should be adopted, as was, it would continue to be elective. Judge Folger was also equally accurate in his statement upon the insertion of the clause making justices of the peace in cities, and justices of District Courts elective, that police justices and Police Courts would be within the provisions relating generally to inferior courts of civil and criminal jurisdiction. They were purposely taken out of the operation of that section by the amendment now under consideration. By the amendment perfecting the section, every judicial officer in cities was provided for and made elective. The policy of the framers of the Constitution was to give to the electors the choice of judicial officers of all grades, and this was done as to all such offices in existence at the time, except the temporary office of commissioner of appeals. The Constitution does not take from the electors the choice of a single office by name, with the exception stated, and if it had been intended to make the office of "police justice" an exception, as not embraced in the term "justice of the peace," the attention of the convention called to that office as it was, it would, with a view to certainty have been expressly named in the clause inserted, from excess of caution to provide for offices not otherwise provided for lest some might have been overlooked. We must assume that the members of the convention well understood the distinctive characteristics and jurisdiction of justices of the peace, and adopted the provision with a clear understanding of its effect. The convention had already, in the first clause of the section, provided for the election of justices of the peace in the several towns of the State, and the clause under consideration was inserted to make the officers in cities exercising the same powers also elective, and the office was described by a name indicating to the legal mind as well as to the popular intelligence, the character and particular functions of the office intended.

If the constitutional mandates in respect to every office could be evaded by simply devolving the duties upon an officer under another name, the sanctions of that instrument would be of but little value. The office of police justice, under the act of 1873, is that of a "justice of the peace," and could only be filled by an election. The appointment of the parties holding the Court of Sessions, by the mayor and aldermen of the city, was therefore a nullity, as is also the act under which the appointments were made. The interpretation of the Constitution, which would exclude police justices from the class of officers elective under the generic term of justices of the peace, would be extremely technical and literal, in disregard of the spirit as well as the plain and positive meaning of the language employed.

The other objection is to the title of the act. The mandate of the Constitution is, that "no private or local bill which may be passed by the legislature shall embrace more than one subject, and that shall be expressed in the title." (Const., art. 3, § 16.) The purpose and object of this provision are so apparent, and have been so repeatedly expressed by the courts, that they need not be re-stated here. (*Connor v. Mayor, etc., of N. Y.*, 1 Seld., 285; *Sun Mut. Ins. Co. v. Same*, 4 id., 241; *People v. Hills*, 35 N. Y., 449; *Gaskin v. Meek*, 42 id., 186; *Huber v. People*, 49 id., 132.) It is a salutary enactment, and commends itself in view of the evils resulting from a disregard of it, to the favorable consideration of legislators and courts. Like every other constitutional enactment, it should receive a reasonable interpretation, and have full effect according to the intent of its framers and the people by whom it was adopted, as such intent is expressed in its terms. Neither the provision itself, or any law which may be brought to a test under it, should be hypercritically interpreted, and a strained and unmeasurable effect given it, to the annulling of laws deliberately passed by the legislature. If, however, an act of the legislature, local or private in character, does embrace upon a fair and reasonable construction two or more distinct subjects, or embracing but one subject, the title does not, upon a like construction intelligently express that subject, there is no room for the exercise of a presumption, for there is no question of intent involved, but the law must be held void

as violative of a positive requirement of the Constitution. This is entirely consistent with all that this court has said when reasoning in support of laws questioned as in conflict with the requirement. There has been no intent to relax the rules which have governed in applying the test to this provision to statutes as they have come under review, and general expressions in opinions of judges should not be interpreted as indicating a leaning of the court in that direction. (*People v. Briggs*, 50 N. Y., 553; *Brewster v. City of Syracuse*, 19 id., 116; *Connor v. Mayor, etc., supra.*) The title of the law is, "An act to secure better administration in the Police Courts of the city of New York." The body of the act removes from office all the police justices then in office, and repeals the laws under which they were elected and held office. It provides for the appointment of ten police justices to take their place and exercise their powers, and prohibits those removed from office, as well as the aldermen and district justices and other city officers, not being judicial officers, from exercising any such power and authority thereafter. (Laws of 1873, chap. 538, § 1.) Each of the police justices in office at the time of the enactment of this law had authority and it was his duty to hold in his order Police Courts. He was also a member of a board of police justices and had duties to perform in connection with his associates as such, and was also a member of the Court of Special Sessions of the Peace, authorized and required to sit and act as one of the justices of such court. Their duties and authorities were entirely distinct and each was specially conferred by statute, and the performance of each of the duties regulated by law. Each and every of their duties and powers were devolved, in terms, by the act under review, upon the ten police justices authorized to be appointed, and the exercise of the powers and performance of the duties expressly regulated by the same act. The title of the act indicates but a single subject, and that is, in substance, to reform the administration in one of these tribunals, viz., the Police Courts held by a single justice. It, in effect, creates new Police Courts, which may or may not secure a better administration of the law, and also a new board of police justices and a new Court of Special Sessions, the court in which the plaintiff in error was convicted. The

administration of the Police Courts might have been improved without touching or affecting the other tribunals named. The powers and jurisdiction of a "Police Court" and of the justice holding the same were prescribed by law, and are such as appertain more immediately to the preservation of the peace, the police of the city, the arrest, examination and holding to bail of offenders against the law, and the summoning, trial and conviction for certain minor offences. The Court of Special Sessions has jurisdiction to try, hear, determine and punish all complaints for misdemeanors; and this jurisdiction is declared to be exclusive, except in certain specified cases. A reorganization of a court of this large jurisdiction is not within the title of an act relating to an improved administration in Police Courts only; and so much of the act as relates to Courts of Special Sessions is entirely beyond and outside of the enactments relating to the Police Courts. If the regulation and reformation of the Police Courts was, as indicated by the title, the subject of the act, the reorganization and reformation of the Courts of Special Sessions was another and distinct subject, and the act is subject to condemnation as embracing two distinct subjects. But it may be said, with great propriety, that both courts might well have been provided for and reorganized in one act as being connected with and parts of one scheme for the government of the city of New York, the preservation of the peace and the punishment of crime. But if this is conceded, as it must be, it follows that the title of the act is defective. It is not such as to indicate to any one the extent and general subject of the legislation covered by it. Instead of, as in some cases, taking in the entire subject in all its details and branches, under a general term or verbiage in the title which would embrace all, and thus include the lesser with the greater, the opposite course is taken and a single detail or branch of the general subject is referred to in the title, and it is sought under it to legislate as to every branch and part of the larger and entire subject in detail. This cannot be, so long, as is the case here, the different parts of the whole subject are capable of division, and one may be the subject of legislative action without the other. Doubtless the entire police system, including the local judicial organizations for the preservation of the peace,

and the prevention and punishment of crime in the city of New York, might be reorganized and remodeled in a single act with a proper title, but such an act, under a title indicating the reorganization of a single, and that an inferior branch of the system, would be clearly in conflict with the Constitution. The subject would not be expressed in the title. The understanding and clear deduction from all the cases, as well as the manifest intent of the requirement, is, that the title of an act may be general, but must be sufficiently comprehensive to embrace the entire subject of the enactment, and if the one subject embraces several departments all must be within the general terms of the title. The title of this act does not conform to the Constitution in this view of it, giving the title the most liberal interpretation and the Constitution the most beneficent application. A reference to the general scope and terms of the act will clearly demonstrate that the title fails to express the subject of the legislation, or indicate the character or extent of the changes effected by it in the courts and magistracy of the city. The title of the act is only indicative of some change in the form and mode of administering the laws in one of the courts of the city, some new regulations, administrative in their character, in the existing Police Courts of the city. The major part of the act and its principal provisions are not within the limits of the language of the title. That does not look to, or intimate, any reform or change in the constitution of any court, but merely a reform in the practice or administration in the courts named in the title. It certainly comes far short of indicating or intimating the abolishing of the existing Police Courts and Courts of Special Sessions, and the establishment of other like tribunals in their stead, or the removal from office of one class of magistrates, and the appointment of another ; neither does it manifest an intent to take from the electors of the city the choice of the new magistrates, and confer their appointment upon a local authority. Administration is the act of administering—of conducting the office, or in this case the execution of the powers and duties of the courts named ; the administering the laws by those courts in their application to particular persons or cases. A reformation in the administration or conduct of the courts is entirely different from a radical reconstruction

and reorganization of the courts themselves. The objection is not that the subject of the act accomplishing the latter result is not expressed by the most apt and fit terms. The difficulty is, that by a title merely expressive of a design to secure a better administration in the Police Courts, the subject of the statute is not expressed or indicated in any form or sense; and that no one reading the title would suspect the real purpose and object of the body of the law. If the Constitution is not to be made a dead-letter, an act, the title of which not only effectually disguising and concealing the real purpose of the law, but giving an entirely false impression as to its real import, as is the case in the act before us, cannot be sustained or regarded as a substantial or reasonable compliance with it. The motives of the legislature in the enactment of the law are not in question. The purpose and object are to be judged by the body of the act, and the great objection to the validity of the law, as violative of the provisions of the Constitution under consideration, is that the legislature have, in the body of the act, sought to accomplish a purpose not expressed or indicated in the title of the bill, and in the enactment have departed from, and entirely lost sight of, the limited and particular subject expressed by the title.

The judgment in *Huber v. The People* (49 N. Y., 132; S. C., 1 Cowen's Crim. Rep., 519), was the unanimous judgment of this court, and the case was not regarded as a border case, but the law was thought to be in manifest conflict with the Constitution in the respect in which it was declared invalid. In view of the consequences resulting from the decision, the court, so far from giving a strict or exclusive effect to this section of the Constitution, were inclined, if possible, to hold the provision of the statute then under consideration as within the general terms of the title of the act, but were unable upon any fair interpretation to do so. This case presents a far more marked and distinct departure from, and disregard of the Constitution than did that. Here there can be hardly a pretext, certainly no plausible argument, in support of the claim that an act as general and radical as this, in the changes effected in the law abolishing and dissolving the existing Police Courts and Courts of Special Sessions of the Peace, abolishing the office of dis-

strict police justices and removing the incumbent from office, and removing the clerks, officers and attendants of the old courts and establishing other courts, and providing for the appointment of ten police justices for the city at large, and creating new clerks and officers, and providing for their appointment, is expressed by or embraced within the terms of the title of an act "to secure better administration in the Police Courts." The court was not well constituted, and the act under which it was organized was void.

Judgment should be reversed.

All concur with *Johnson, J.*, except *Church, Ch. J.*, and *Allen, J.*, dissenting.

Judgment affirmed.

SUPREME COURT.

First Department. — New York, 1874.

GILL ET AL. v. THE PEOPLE.

The prisoners were convicted before the Court of Special Sessions of the Peace in the city of New York, of keeping a disorderly house.

The question came up on a writ of certiorari.

The return to the writ stated that the relators were brought before a committing magistrate, and that they thereupon elected to be tried by the Court of Special Sessions.

Held, that such election waived all objections to the jurisdiction of the court.

At the close of the trial, and after the prisoners had been convicted and sentenced, their counsel desired the court to note an appeal to the Court of General Sessions, for a rehearing of the case.

Held, that such a question does not properly arise upon *certiorari*. Such writ brings up only the proceedings to and including, but not subsequent to judgment, so that the only question to be determined is, whether any error has been shown, such as would justify a reversal of the judgment.

The counsel for the prisoners objected to the complaint on the ground that it did not specifically charge the prisoners with being the keepers of the disorderly house on the 24th day of May, 1874.

Held, that the rule is well settled, that the indictment will be good if the day and year can be collected from the whole statement, though they be not expressly averred. In this case the day and year is clearly gathered from the entire complaint and verification.

The defendant Gill was sworn in his own behalf. *Held*, that it was perfectly proper, and it was the duty of the court to interrogate him fully, to test the truth of his direct testimony.

Peter Mitchell, for prisoners.

B. K. Phelps, for the people.

BARRETT, J.:—(1.) The justices of the Special Sessions return to the writ of certiorari that the appellants were originally brought before a committing magistrate, and thereupon elected and required to be tried by such Court of Special Sessions. The return is not traversed, nor is there anything *in the record*, impugning its truth. This disposes of all the objections to the jurisdiction of the court. (*The People v. Riley*, 5 Park. C. R., 404; Laws of 1855, chap. 337, § 5; Laws of 1859, chap. 491, § 1.)

(2.) At the close of the trial, and after the prisoners had been sentenced, counsel desired the court to note an appeal to the Court of General Sessions for a rehearing of the case. The point is now made, that, after such appeal, the court erred in committing the prisoners to the penitentiary. The notice given to the court below, was not of an intention to remove the conviction by certiorari, but an offer to become bound in a recognizance to appear at the General Sessions, as provided by article 4, title 3, part 4, chapter 2 of the Revised Statutes. (2 R. S. [Banks' 4th ed.], p. 903, § 55.) These provisions were abolished by chapter 769 of the Laws of 1857 (§ 25), but seem to have been restored by chapter 339 of the Laws of 1859 (§ 1).

We have not been referred to any law, giving a direct appeal to the General Sessions, with a rehearing in that court, to a person convicted at the Special Sessions, except, perhaps, in cases of petit larceny, or assault and battery, not riotous; and then only where the prisoner had not demanded such trial. (2 R. S., Edmond's ed., pp. 739, 740, §§ 22, 23, 26.) But the question does not properly arise upon *certiorari*. That brings up the record and the proceedings to and including, but not subsequent to, judgment, and we have simply to determine whether any error has been shown, such as would justify a reversal of the judgment. If, as claimed,

the judgment became void by a simple appeal to the General Sessions, then this *certiorari* was improperly issued, and should be quashed. The remedy in such case would be to offer the Special Sessions bail for trial at the General Sessions, and if this were refused, to procure the release of the prisoner, pending the new trial, upon *habeas corpus* issued for the purpose of fixing and taking such bail.

(3.) The remaining points call for no special consideration. That, as to the constitution of the court, has been decided adversely to the views of the appellants, by the Court of Appeals.

The objection to the form of the judgment of the court below, is not well taken. It is questionable whether even the particular situation of the house, by way of local description, need be stated. (2 Bish. Cr. Pro., § 111.)

The objection to the form of the complaint, is equally untenable. It was not taken at any stage of the proceedings below, and the idea now advanced is certainly somewhat far fetched, viz., that a complaint is to be deemed barred by the statute of limitations, because no specific date is named. The complaint, however, does substantially aver that upon the 24th day of May, 1874, the appellants were the keepers of the disorderly house in question ; that is clearly to be gathered from the entire complaint and its verification. The rule is well settled, that the indictment will be good if the day and year can be collected from the whole statement, though they be not expressly averred. (1 Star. Cr. Pl., ed. 55 ; 1 Bish. Cr. Pro., § 391.)

(4.) There is nothing in the exceptions as to the admission of testimony, nor was the objection specified under the appellants' fifth point, taken to any particular question. It is evident from a perusal of the entire case, that the prisoners were not prejudiced by the admission of illegal evidence.

(5.) The remaining ground upon which a reversal is claimed, is that the court below erred in specially interrogating the prisoner.

Gill chose to take the stand as a witness upon his own behalf, and it then became perfectly proper, and indeed the duty of the court, to interrogate him as fully as might be needful to test the truth of his direct testimony.

(6.) We have gone over the evidence, and are quite satis-

fied that the prisoners were guilty, and that the judgment was correct.

The conviction and the judgment of the Court of Special Sessions should therefore be affirmed.

DAVIS, P. J., and DANIELS, J., concurred.

Judgment and conviction affirmed.

SUPREME COURT.

First Department.—New York, 1874.

BIELSCHOFKY V. THE PEOPLE.

The prisoner was jointly indicted with two others, for obtaining money by false pretences, from one Catharine Wulff. He was convicted and sentenced.

The indictment alleged several representations and averred that each was false and fraudulent. Direct evidence was given of the falsity of but one.

The court charged, in substance, that it was sufficient to show the falsity of any one of the alleged pretences which induced the complainant to part with her money.

Held, that this was correct. It was sufficient to show that one of the material representations alleged was false and fraudulently made, provided it was proved to the satisfaction of the jury that such representation was a substantial inducement to the parting with the money.

On the trial it was shown, under objection, that the prisoner with one of his co-indictees, practiced the same fraud on another person a day or two prior to the commission of the offence charged in the indictment in which the prisoner acted the same part played by another of the parties on the occasion of obtaining the money from the complainant.

Held, that the evidence offered and received of previous like transactions of the accused, was given and received to show the *quo animo*, or intent, of the accused in the particular offence charged, and also as tending to show the known falsity of the pretences upon which the money of Mrs. Wulff was obtained. For these purposes, it was competent.

Wm. F. Kintzing, for the prisoner.

Benj. K. Phelps, for the people.

DAVIS, P. J.:—The plaintiff in error was indicted jointly with two other persons for obtaining \$150 from one Catha-

rine Wulff, by means of false pretences and representations. The indictment set out several alleged representations, each of which was averred to have been false and fraudulent. The evidence tended to show the making of the several representations ; but direct evidence was given of the falsity of but one. The court was asked to direct an acquittal, on the ground that the prosecution had not negatived the allegation that one of the parties had goods at the custom-house, which were held for non-payment of duties, and would be sold if the duties were not paid thereon, on that day.

The court held, in substance, that it was sufficient to show the falsity of any one of the alleged pretences which induced the complainant to part with her money. We think the ruling was correct. It was sufficient to show that one of the material representations alleged was false and fraudulently made, provided it was proved to the satisfaction of the jury that such representation was a substantial inducement to the parting with the money. (*People v. Haynes*, 11 Wend., 557 ; *People v. Herrick*, 12 id., 87 ; *Fowler v. The People*, 18 How., 493.) Besides, it could hardly be said, with accuracy, that there was *no evidence* tending to show that the other representations were not also false and fraudulently made, because evidence was given, proper for the consideration of the jury, tending to establish a conspiracy on the part of all the persons indicted, to obtain Mrs. Wulff's money by false pretences. And if the jury were satisfied of the existence of such a conspiracy, and had proof that a material portion of the representations made in carrying it into effect were false, they might properly find, in the absence of all explanation, that the other statements were made for the same purpose, and were also untrue.

The conduct and declarations of the several parties, together with the proof showing that one of them, with the prisoner, went through the same performance two days before, for the purpose of getting money from another woman, and the verisimilitude of their acts and statements on both occasions, were quite enough, we think, to justify the court in submitting to the jury, whether or not the whole story was not a preconcerted scheme to accomplish a criminal purpose.

The other point made in the case is upon the admissibil-

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ity of the evidence showing that the plaintiff in error, together with one of his co-indictees, practiced the same fraud on another person a day or two prior to the commission of the offence charged in the indictment, in which the prisoner acted the same part played by another of the parties on the occasion of obtaining the money of Mrs. Wulff.

It seems to be supposed by the learned counsel for the plaintiff in error, that this evidence was given to affect the general character of his client. It was offered for no such purpose. It is well settled that evidence of the general bad character of the accused cannot be given on the trial, unless he first opens the door by giving evidence of his general good character. But this rule does not go to the length to exclude evidence given for other and competent purposes, because its incidental or indirect effect may be to prejudice the character of the accused in the minds of the jury. Such a rule would exclude proof of the crime charged in the indictment, because it might be well argued that proof of the party's crime could not be given without impairing to a greater or less extent the value of his presumed good character.

The evidence offered of the previous like transactions of the accused, was given to show the *quo animo*, or intent, of the accused in the particular offence charged, and also as tending to show the known falsity of the pretexts upon which the money of Mrs Wulff was obtained.

For these purposes we think it was competent; and the effect to which it was entitled, was left by the court fairly and entirely to the jury.

The cases are very numerous which hold, with more or less directness, the propriety of such evidence.

The judgment must be affirmed.

DANIELS and BARRETT, JJ., concurred.

Judgment affirmed.

COURT OF APPEALS.

NEW YORK, 1874.

SLATTERLY v. THE PEOPLE.

The prisoner was a policeman, and, while in a state of intoxication, assaulted the prosecutor without cause and beat him with his club. At the close of the trial the prisoner requested the court to charge that the prisoner could not be convicted, under the indictment, for an assault with a sharp dangerous weapon, with intent to do bodily harm, and this was conceded by the district attorney. The court made no ruling upon it.

Held, that it was erroneous as a legal question, but the error is not available because : 1st. It was the request of the prisoner's counsel. 2d. The court made no ruling upon it. 3d. There was no exception.

The counsel for the prisoner requested the court to charge the jury that, before they could convict the prisoner of an assault with intent to kill, they must be satisfied upon the evidence that, had death ensued, the prisoner would be guilty of murder in the second degree. This request was refused, and exception taken.

Held, that as the crime charged was an assault with intent to kill, and that in his charge the judge distinctly told the jury that it was indispensable to a conviction of the principal offence to find that the prisoner intended to kill the prosecutor, and gave the jury detailed instructions as to the rules of evidence applicable to the offence, and as there was no exception to any part of the charge, it must be assumed that the jury found the necessary intent, consequently there was no error.

Held, also, that when the instructions of the court are unexceptionable as to the offence charged and for which the prisoner is on trial, and such instructions cover every element of the crime, and correct rules for the proper application of the evidence, it is not strictly the right of a prisoner to ask instructions upon a hypothetical case, based upon other facts, but all that the prisoner can legally ask is, that the court shall correctly charge the jury as to the crime for which he is being tried.

The prisoner's counsel requested the court to instruct the jury, that, in order to convict, they must specifically find that the prisoner would have been guilty of murder in the second degree, if death had ensued. This request was refused.

Held, no error. This request excluded the hypothesis of murder in the first degree, and implied that in such an event the prisoner could not have been convicted.

William F. Kintzing, for the prisoner.

Benj. K. Phelps, for the people.

CHURCH, Ch. J. At the close of the trial, the counsel for the prisoner requested the court to charge that the prisoner could not be convicted, under the indictment, for an assault with a dangerous weapon, with intent to do bodily harm. This was conceded by the district attorney. It does not appear that the court made any ruling on the point. The proposition was suggested in behalf of the prisoner and assented to on behalf of the people. It was erroneous as a legal question, as the statute provides that, under an indictment for an assault with intent to kill, a conviction may be had for the other offence specified in the request. (Laws of 1854, chap. 74.) But the error is not available here for three reasons: 1st. It was the request of the prisoner's counsel. 2d. The court made no ruling upon it. 3d. There was no exception. (53 N. Y., 525.) It may have been and probably was assumed that the facts did not justify a conviction for that offence on account of the character of the instrument.

The counsel for the prisoner also requested the court to charge the jury that, before they could convict the prisoner of an assault with an intent to kill, they must be satisfied upon the evidence that, had death ensued, the prisoner would be guilty of murder in the second degree. This was refused and an exception taken. It is claimed that the learned judge intended by this refusal to instruct the jury that the intent to kill, necessary to be established to justify a conviction under this indictment, might be something less criminal or different than would be necessary to convict of murder in the second degree, if death had ensued. This does not follow. No reason is given for refusing the request, and if any existed which would justify it, error cannot be alleged.

The crime charged was an assault with intent to kill, and in the charge the judge distinctly told the jury that it was indispensable to a conviction of the principal offence to find that the prisoner intended to kill the prosecutor, and gave the jury detailed instructions as to the rules of evidence applicable to the offence. There was no exception to any part of the charge, and it must be assumed that the jury found the necessary intent.

When the instructions of the court are unexceptionable as to the offence charged, and for which the prisoner is on

trial, and such instructions cover every element of the crime, and correct rules for the proper application of the evidence, it is not strictly the right of the prisoner to ask instructions upon a hypothetical case, based upon other facts. It may be conceded that in order to convict upon this indictment, if death had ensued, the prisoner should have been convicted at least of murder in the second degree, but all that the prisoner can ask is, that the court shall correctly charge the jury as to the crime for which he is being tried. They were properly instructed as to that and they could not have been misled. It was, however, held in 19 New York, 41, that such a refusal to charge was not error upon the merits; and in *The People v. Shaw*, 1 Park., 327, *Walworth*, circuit judge, is reported as charging that the prisoner should be convicted if the assault was committed under such circumstances that, had death ensued, the offence would have been either murder or manslaughter in any of the various degrees; but this was qualified by the additional paragraph that the prisoner could not be convicted on the main charge if he had no intent to kill, or if he did the act under the belief that it was necessary in self-defence, and it is said that the proceedings were affirmed by the Supreme Court. The intent to kill is the distinguishing element of the offence, while every degree of manslaughter and every description of that crime in the statute, except one, is based upon an absence of an intent to kill, and how this crime can be established by proving an assault under such circumstances, that, had the killing taken place, it would have been only one of the degrees of manslaughter, which is based upon the absence of an intent to kill, is manifestly incongruous. It may be that in neither case did the court intend to go to that extent.

Another ground for the refusal is, that the request required the jury to be instructed that in order to convict they must specifically find that the prisoner would have been guilty of murder in the second degree, if death had ensued, thus excluding the hypothesis of murder in the first degree, and implying in such an event the prisoner could not have been convicted. This was clearly improper.

We have no power to review the facts. There is no such legal defect in the evidence as to constitute a question of

law; if there was, it would not be available here without an exception.

The judgment must be affirmed.

All concur.

Judgment affirmed.

COURT OF APPEALS.

NEW YORK, 1875.

KERRAINS V. THE PEOPLE.

The prisoner was indicted, tried and convicted at a Court of Sessions of Columbia County, of an assault with a deadly weapon with intent to kill.

The accused worked for Son, the complainant, and lived in a dwelling house belonging to him. The agreement between the accused and complainant was that Kerrains was to work for Son for a year, if they could agree; Son to pay thirteen shillings per day, and to furnish Kerrains with a house, the prisoner to work at whatever the former had for him to do. Kerrains worked for Son until the latter part of June, 1871, when Son asked him to "haul the bleach," which he refused to do. Son then discharged him, paid him up, and told him to leave the premises or he would throw his things out. The prisoner refused, and did not leave. Son with two men went to the house occupied by Kerrains, in his absence, and commenced removing Kerrains' furniture. Kerrains was sent for by his wife—he returned, saw what Son was doing, picked up an ax, went into the house and ordered Son and his men out. Son refused to go, presented a pistol, when an altercation occurred and Kerrains struck Son with the ax, inflicting an injury.

On the trial Kerrains was sworn in his own behalf and was asked the following question: "What was your intention in taking the axe from the shed to the house?" The question was objected to and the objection sustained.

The court charged the jury that the prisoner occupied the house as a servant, and not as a tenant; and, therefore, the prosecutor had the legal possession.

Held, that if the relation of master and servant existed it would follow that the legal possession of the house was in the prosecutor, and he had the legal right to remove the furniture and goods therein, and to employ the necessary force for that purpose, and that the defendant would not be justified in using force to prevent it. The question depends upon the nature of the holding, whether it is exclusive and independent of, and in no way connected with the service, or whether it is so connected, or is necessary for its performance. From the facts in this case, the court decided correctly, that the defendant occupied as a servant, and not as a tenant.

Held, that the court, in sustaining the objection of the prosecution to the question, "What was your intention in taking the axe from the shed to the house?" committed an error. The intent to kill was indispensable to be es-

established by the prosecution, it constituted the vital element of the offence, and although it is true that the time when that intent must exist was when the blow was struck, yet it was competent for the defendant to testify to any fact tending to disprove such intent. It is a fact to be established, and, of course, may be repelled. The rule is, following *McKown v. Hunter*, 30 N. Y., 625, that when the motive of a witness in performing a particular act, or making a particular declaration, becomes a material issue in a cause, or reflects important light upon such issue, he may himself be sworn in regard to it, notwithstanding the difficulty of furnishing contradictory evidence, and notwithstanding the diminished credit to which his testimony may be entitled as coming from the mouth of an interested witness.

R. E. Andrews, for the prisoner.

Charles L. Beale, for the people.

CHURCH, Ch. J. The principal question of law contested on the trial, and elaborately argued in this court, is, whether the relation of master and servant, or landlord and tenant, existed between the prisoner and the prosecutor, Mr. Son, in respect to the house occupied by the former. Although not decisive of the guilt or innocence of the prisoner, the determination of the question had properly a material influence.

If the relation of master and servant existed it would follow that the legal possession of the house was in the prosecutor, and he had the legal right to remove the furniture and goods therein, and to employ the necessary force for that purpose, and that the defendant would not be justified in using force to prevent it. And yet, if the acts of the prosecutor were of such a threatening character, by the use of a pistol or other deadly weapon, that the prisoner believed, and had reason to believe, that his life was in imminent danger, he might be justified in using the necessary means to avert it. On the other hand, if the prisoner was holding the house as a tenant, and had a lawful right to defend his possession, and his property, by the use of proper and necessary means, yet, if the force used was unnecessary or excessive, either in amount or the kind of weapon employed under the circumstances presented, and after making due allowance for provocation and irritation, he might still be amenable to a criminal prosecution.

The court charged the jury that the prisoner occupied the

house as a servant, and not as a tenant; and hence that the prosecutor had the legal possession.

The defendant stated the contract to be, that he was to work for Mr. Son a year at thirteen shillings a day, and have the use of the house he lived in and garden for that period. The prosecutor stated it substantially the same. He said: "I made a bargain with him for a year, if he and I could agree. I was to pay him thirteen shillings a day, and he was to have a house furnished him." There was no dispute but that the defendant was to have *the* house in which he then resided. It does not appear whether the wages were less by reason of furnishing the house, or whether any or what allowance was intended on that account. Nor does it distinctly appear whether a residence in that particular house was necessary to the proper discharge of the defendant. If the occupation is connected with the service, or if it is required, expressly or impliedly, by the employer for the necessary or better performance of the service, then it is for his benefit, and he continues in possession. Such was clearly the case of *Haywood v. Miller*, 3 Hill, 90, where a farmer hired a man and his wife to work a farm for wages. The occupation of the house was necessary to the performance of the service; and *The People v. Annis*, 45 Barb., 304, was substantially the same, although I am unable to agree with the learned judge who delivered the opinion in that case, that immediately upon the termination of the service a tenancy at will, or by sufferance, springs up. In order to have that effect, the occupancy must be sufficiently long to warrant an inference of consent to a different holding. Any considerable delay would be sufficient, but I can see no principle which would change the occupant *eo instanti*, from a mere licensee to a tenant. The employer should resume control of his property within a reasonable time or consent would be inferred. Whether this time is a day or a week may depend upon circumstances. In *Doyle v. Gibbs*, 6 Lans., 180, the consent of the employer that the employed might remain until his wife recovered from an illness, was held not to amount to a consent.

The circumstance that the right of occupation terminates with the abrogation of the contract of service, by consent or by the discharge of the servant, is not decisive. The ques-

tion is, what was the character of the holding under the contract? If that was a tenancy, then the party holding over would be a tenant at will, and the landlord would not be justified in entering with strong hand. So, while a deduction from wages of a specified sum for the use, or the absence of such an arrangement, would be a material circumstance, it would not be in all cases conclusive either way. The question depends upon the nature of the holding, whether it is exclusive and independant of, and in no way connected with the service, or whether it is so connected, or is necessary for its performance. And this, I think, is the result of all the cases. The question has often arisen in England, under the poor laws, to determine what occupation would confer a settlement, the courts recognizing, as controlling the distinction between an occupation as a tenant or as a servant. (*R. v. Minster*, 3 M. & S., 276; *R. v. Kelsstern*, 5 id., 136; *R. v. Chesnut*, 1 B. & A., 473; *R. v. Milkridge*, 1 T. R., 598; *R. v. Langsiville*, 10 B. & C., 899; *R. v. Benneworth*, 2 id., 755.) The case of *Hughes v. Chatham*, 5 M. & G., 54, arose under the reform act, requiring a registry of voters, the statute requiring that the person should *occupy as owner or tenant*. The facts were, that a master ropemaker in a royal dock-yard had, as such, a house in the dock-yard for his residence, of which he had the exclusive use, without paying rent, as part remuneration for his services, no part of it being used for public purposes. If he had not had it, he would have had an allowance for a house, in addition to his salary. The case was elaborately argued, and thoroughly considered, and it was held, that the ropemaker occupied as a tenant and not as a servant. FINDAL, C. J., in delivering the opinion of the court, said: "There is no inconsistency in the relation of master and servant with that of landlord and tenant. A master may pay his servant by conferring on him an interest in real property, either in fee for years or at will, or for any other estate or interest, and if he do so the servant then becomes entitled to the legal incidents of the estate, as much as if it were purchased for any other consideration." * * *

"And, as there is nothing in the facts stated to show that the claimant was required to occupy the house for the performances of his services, or did occupy in order to their

performance, or that it was conducive to that purpose more than any other house which he might have paid for in any other way than by his services ; and as the case expressly finds that he had the house as part remuneration for his services, we cannot say that the conclusion at which the revising barrister has arrived is wrong."

I have cited the language of the court, because it lays down concisely the correct rule for determining the question involved in this class of cases.

The question in the case before us is presented somewhat differently. Each party relied upon the terms of the contract, with only the additional facts that the house was a part of the mill property, and had been occupied for several years previously by the prisoner while engaged as a laborer in the mill. There was no request to submit the facts to the jury to determine whether the house was occupied to enable the prisoner the better to perform the service in which he was engaged ; or, in other words, whether it was not occupied as an appendage to the mill, and really for the benefit of the owner ; nor was there any evidence of an allowance for rent, but it was left to the court, upon the contract and facts before stated, to be determined as a question of law, and, in my judgment, the court decided correctly, that the defendant occupied as a servant, and not as a tenant. The inference from these facts is reasonable, if not irresistible, in the absence of any provision for an allowance for rent, that the house was intended to be occupied by an employe for the benefit of the owner in carrying on the mill. The case thus presented is analogous to that of a person employing a coachman or gardener, and allowing or requiring him to reside in a house provided for that purpose on the premises ; or a farmer who hires a laborer for wages, to work his farm, and to live in a house upon the same. In these cases the character of the holding is clearly indicated by the mere statement of facts. It is not impossible that other facts may exist to strengthen or weaken the inference that the prisoner occupied as a servant, and not as a tenant, but from the facts proved there was no error in holding that he occupied as a servant. Both parties regarded it as a question of law upon substantially undisputed facts, although there are cases where the character of the holding is so uncertain,

from conflicting evidence or inferences which may be drawn, as to render it proper to submit the question to a jury. (3 M. & S., 790.)

It appears that the prisoner was absent at work when the prosecutor went, with his men, to the house to remove the furniture, etc., but soon returned and went to the wood house, and came back with the axe in his hand, with which, afterward, the blow was inflicted.

When the prisoner was upon the stand, as a witness, his counsel asked him the question: "What was your intention in taking the axe from the shed to the house?" To which there was an objection, which was sustained, and an exception taken. The General Term sustained this ruling upon the ground that it was too remote, and that the prisoner could only speak as to his intent at the time of his striking the blow. I cannot concur with this view as applied to the question involved. The intent to kill was indispensable to be established by the prosecution. It constituted the vital element of the offence, and although it is true that the time when that intent must exist was when the blow was struck, yet it was competent for the defendant to testify to any fact tending to disprove such intent. It is a fact to be established, and, of course, may be repelled. The prisoner having inflicted the injury with the axe, his previously going to the shed after it, was a circumstance bearing upon his intent in striking the blow, and from which an inference that he procured it for that purpose might be claimed to result. It was a legitimate circumstance to prove the fact of intent. If his taking the axe was not for that purpose, but for an innocent purpose, while it would not conclusively disprove the intent at the time of striking the blow, it would tend to destroy a material circumstance bearing upon that question against him. If he could disprove the intent, at the time of the act by a general denial, it follows that he might disprove any fact tending to establish it. His going to the shed for the axe would be immaterial, except for the purpose of showing that he brought it to be used as it was used, and if that purpose is disproved, it renders the circumstance of no moment. The rule is very well stated by *Hogeborn, J.*, in *McKown v. Hunter*, 30 N. Y., 625. After citing 4 Kernan, 567; 21 New York, 121; 25 New York, 430, he

says: "These cases go very far to establish the general principle that when the motive of a witness in performing a particular act, or making a particular declaration, becomes a material issue in a cause, or reflects important light upon such issue, he may himself be sworn in regard to it, notwithstanding the difficulty of furnishing contradictory evidence, and notwithstanding the diminished credit to which his testimony may be entitled as coming from the mouth of an interested witness." The motive for procuring the axe was a fact material upon the principal fact in the case, and it was clearly competent for the prisoner to testify in respect to it.

We do not deem it necessary to notice the other points made. For this error the judgment must be reversed, and a new trial granted.

All concur; except ANDREWS and MILLER, JJ., not voting.

Judgment reversed.

SUPREME COURT.

First Department.—New York, 1875.

TEMPLETON V. THE PEOPLE.

The prisoner was indicted and convicted of an assault, with intent to kill. The defence was insanity. Dr. Clymer, was sworn and examined as a witness, on the part of the defence. He testified that he was a physician and understood the indications and symptoms of the existence of the form of insanity by which it was claimed the prisoner was affected, and that the facts relied upon, indicated unsoundness of mind.

In submitting the case to the jury the court said, that he, "placed no reliance whatever upon Dr. Clymer's testimony, except what is due to the testimony of a sensible and honest gentleman; but I have equal respect for the opinion of you, gentlemen, who, as men of the world, having attained a mature age, and seen life in many of its phases, are quite as competent, perhaps, to pass upon this testimony as experts, as is Dr. Clymer."

Held, that this language conveyed to the jury the opinion of the court that it was their duty to disregard the evidence of the witness as an expert and was, therefore, error. The evidence of medical experts is admitted on questions of insanity, on the ground that jurors are not deemed equally

skilled and as able to decide whether insanity exists, as are such experts. The jury is to determine what weight is to be given to such testimony and they must be left at liberty to exercise their judgment on the subject, without being controlled by any positive direction by the court.

John D. Townsend, for the prisoner.

Daniel. G. Rollins, Jr., for the people.

DANIELS, J.: The prisoner was convicted of committing an assault upon his wife, with intent to kill.

The perpetration of the act constituting his offence was substantially conceded on the trial, but it was claimed in his behalf that he was at that time insane. The peculiar form of the disease which he was alleged to be affected by, was that of delusion, concerning supposed or assumed danger to the virtue of his wife, and her exposure to improper influences in that respect from and inclinations of her family relatives. There was evidence given, tending, in some degree, to show that to have been his mental condition before and at the time when the criminal act was charged to have been committed by him. While the defence made in his behalf was by no means a strong one, there was still enough of it, so long as the charge imputed a crime, to render it the subject of consideration and decision by the jury; and it was so regarded, for it was submitted to them in that view by the learned judge presiding at the trial.

An important part of the evidence upon this subject, was given by Meredith Clymer, a witness who was sworn and examined on behalf of the prisoner. He was a physician, professing to understand the indications and symptoms of the existence of the form of insanity by which it was claimed the prisoner was affected, and he testified that the facts relied upon in his favor, indicated unsoundness of mind. When the case was submitted to the jury, the learned judge stated to them, that he "placed no reliance whatever upon Dr. Clymer's testimony, except what is due to the testimony of a sensible and honest gentleman; but I have equal respect for the opinion of you, gentlemen, who, as men of the world, having attained a mature age, and seen life in many of its phases, are quite as competent, perhaps, to pass upon this testimony as experts, as is Dr. Clymer." This was not a

positive direction to the jury to disregard the evidence of the witness, although quite a decided opinion that it was their duty to do so. A mere expression of opinion as to the weight or effect of the evidence, which still allows the juror to be guided and governed by their own convictions, forms no proper ground for an exception. That may be proper, and even necessary, under certain circumstances, to enable the jury to give appropriate consideration to evidence requiring their judgment. The evidence of witnesses who are brought upon the stand to support a theory by their opinions, is justly exposed to a reasonable degree of suspicion. They are produced not to swear to facts observed by them, but to express their judgment as to the effect of those detailed by others, and they are selected on account of their ability to express a favorable opinion, which, there is great reason to believe, is, in many instances the result alone of employment and the bias arising out of it. Such evidence should be cautiously accepted as the foundation of a verdict, and it forms a very proper subject for the expression of a reasonable guarded opinion by the court. That is often necessary to prevent the jury from being led astray by giving too much weight to evidence really requiring to be suspiciously watched, and which, in many instances, has induced unwarranted verdicts, discreditable to the administration of justice, as well as exceedingly detrimental to the public interest. When the comments of the court are extended no further than that, no fault can be found with them on the part of the accused. But in the present case, what was said upon the subject, was supposed by the prisoner's counsel to go so far beyond the mere expression of an opinion, as to constitute a positive direction that the jury should disregard the evidence given by this witness; and an exception was taken to it because it was believed to be of that character. The proposition was presented by the exception, that the court could not properly direct the jury, that no reliance should be placed in Dr. Clymer's testimony, the jury having as much capacity to determine upon that as Dr. Clymer. The statement of the point excepted to, was clear and explicit, that the jury could not be directed to put no reliance on the testimony of this witness. That had not been done, but the point was taken by the exception, that such a di-

rection should not be given. And it was immediately followed by the response, that, "There is no more reliance to be placed upon it, than upon the testimony of any other person in this case; I regard you, gentlemen of the jury, as equally skilled, as much skilled, and as able to decide, from the evidence, whether or not the prisoner was insane, as Dr. Clymer." This was more than a mere comment, by way of opinion, as to the effect which might be given to the statements of the witness. It was equivalent to a direction to disregard it, by giving it no weight whatever. And that presented the point taken by the exception, just as effectually as if the exception had been again repeated. It was to the controlling direction which in the end was given, that the exception was taken. And as it was taken to the proposition itself, there was no need of repeating it again after that had been stated by the court. The direction was excepted to, and that is all that is required, to entitle the prisoner to present it for the determination and decision of this court. That it was erroneous, is too clear for doubt. For, under the well settled rules of law, the effect of competent evidence is a matter to be disposed of by the jury, under all the circumstances and probabilities of the case. That is particularly their province in the trial of criminal charges, where the question of guilt is exclusively to be decided by them. And they must be left at liberty to exercise their judgment on the subject, without being controlled by any positive direction by the court. (1 Greenl. on Ev., 12 ed., § 49 and note, § 160; *Firemen's Ins. Co. v. Walden*, 12 John., 513, 519; *People v. Guin*, 1 Parker Crim. Rep., 340; *Breen v. People*, 4 id., 380; *Duffy v. People*, 26 N. Y., 588.) That freedom was not afforded them, concerning that portion of the case which was affected by the evidence of the witness Clymer.

The other exceptions presented by the prisoner's counsel, do not appear to rest upon any substantial foundation; but if either of them could be plausibly supported, it would be unnecessary to consider it, as long as the one referred to will necessarily require another trial of the indictment. The judgment of the court of General Sessions should be reversed, and a new trial ordered.

DAVIS, P. J.: The evidence of medical experts is admitted on questions of insanity, on the ground that jurors are not deemed equally skilled, or as much skilled, and as able to decide whether the alleged insanity existed, as are such experts. The law holds that there is more reliance to be placed upon their opinions than the same testimony given by other persons, and therefore it does not permit other persons to give the same kind of evidence. The jury is, in all cases, to determine what weight is to be given to such testimony; but to instruct them that the opinion of experts is entitled to no weight, or to no greater weight than the opinions of persons not allowed to give any, or to instruct the jury that they are deemed equally skilled and as able to decide from facts proven, whether such facts are indications of the disease known as insanity, as experts in that branch of medical science, is to overturn the theory of the law and the established rules of evidence on that subject. I think the learned recorder committed a serious error in his charge. My only difficulty is, in holding that the exception reached the error. But I am inclined to think that the safer course is to apply the exception to the instruction given, which was immediately enunciated in response to the exception. I shall concur, therefore, with my brother *Daniels*.

Brady, J., concurred.

Judgment reversed, and a new trial ordered.

COURT OF APPEALS.

NEW YORK, 1875.

HARRIS v. THE PEOPLE.

The prisoner was convicted by the City Court of Long Island City, of burglary, and sentenced to be imprisoned in the State prison, at hard labor, for the term of seven years and six months.

It is claimed that the court before which the prisoner was tried, was not legally constituted.

The court was created by chapter 460, of the Laws of 1871, and the act is entitled, "An act to revise the charter of Long Island City."

Held, that the constitutional provision contained in the sixteenth section of article 3, of the Constitution, has not been disregarded. It is plain, that an act creating a municipality, and giving to it necessary legislative, taxing, judicial and police powers, embraces but one subject, and the separate provisions of such an act defining and granting these powers are but parts of a whole, and essential to make a whole.

Held, that the object of the constitutional provision was two-fold : to prevent the joining of one local subject to another or others of the same kind, or to one or more general subjects, so that each should gather votes for all ; and to advise the public, and the locality, and the representatives of the locality, and of other parts, of the general purpose of the bill, so that those interested might be on their guard as to the whole or as to the details. The act in question did not go counter to that object, and its title was in obedience to it.

Held, that the verdict was a general one, that is, guilty of the offence alleged in the indictment, i.e., burglary in the third degree. The punishment was greater than that fixed by law, therefore, the case is remanded to the court below, for the proper sentence.

William F. Howe, for the prisoner.

Benj. W. Downing, district attorney, for the people.

FOLGER, J. It is claimed that the City Court of Long Island City, before which the plaintiff in error was convicted, has no constitutional existence. The court was created by chapter 460, of the Laws of 1871. The act is entitled, "An act to revise the charter of Long Island City." The specific point made is, that the act is a local act, that it contains more than one subject, and that the title does not express the subject of the erection of that court. Probably the rule

in *Huber v. The People* (49 N. Y., 132), would make this a local act. But for the purposes of this case we may concede that it is, without so deciding. The constitutional provision, which it is said has been disregarded, is in the sixteenth section of article 3 of the Constitution: That no local bill shall embrace more than one subject, and that shall be expressed in its title. We think it plain, that an act creating a municipality, and giving to it the necessary legislative, taxing, judicial and police powers, embraces but one subject. Every municipality, to be of benefit to its citizens and to be efficient in its action, must have such powers to greater or less extent. Any act which sets out to erect a municipality must give to it these powers, or it is passed in vain. It follows, then, that the separate provisions of the act defining and granting these powers are but parts of a whole, and essential to make a whole. The whole thing, the creation of the municipality, is the subject of the act; and the parts of it are not separate subjects, but separate parts of one general subject. So that the act under which Long Island City was first incorporated embraced but one subject, to wit: "An act to incorporate Long Island City" (Laws of 1870, chap. 719, p. 1729), expressed clearly that subject. The object of the constitutional provision was two-fold: to prevent the joining of one local subject to another or others of the same kind, or to one or more general subjects, so that each should gather votes for all; and to advise the public, and the locality, and the representatives of the locality and of other parts, of the general purpose of the bill, so that those interested might be on their guard as to the whole or as to the details. (*The People ex rel. v. Suprs. of Chautauqua*, 43 N. Y., 10.)

The act last cited did not go counter to that object. The title of it was in obedience to it. The revision of an act which has incorporated a municipality is, by parity of reasoning, but one subject; certainly so if, in the revision, no different general powers are given. The revision may treat of the essential parts of the whole, as well as may the original creative enactment. And if the revision of the act of incorporation, that is of the charter, is but one subject, surely an act which is entitled an act to revise that charter expresses the whole of that subject, while it expresses but

one subject. Such is the title of the act complained of. In the act of 1870, which was the origin of the municipal existence of Long Island City, judicial powers had been conferred. That was an important part of the municipal organization desired and created. An act which, by its title, announced its subject to be a revision of that charter was calculated to give notice that legislation was sought for which might touch upon the subject of the judicial power of the municipality. Thus, the object of the Constitution was carried out. We do not think that the act of 1871 is unconstitutional, on the ground alleged by the plaintiff in error.

We think that the indictment is to be held as one for burglary in the third degree. The verdict was general, guilty. It was, guilty of the offence alleged in the indictment; that is, of burglary in the third degree. The punishment imposed was greater than that fixed by law for that offence. It was the sentence appropriate for burglary in the second degree. The trial appears to have been legally conducted; the conviction appears to have been legal; the sentence alone is illegal. It is not necessary, on account of this, to reverse the judgment. This court has power in such case to affirm the conviction, and to remand the case to the court below, that the proper sentence may be given to the prisoner. (Laws of 1863, chap. 226, amending 2 R. S., 741, § 24; *Ratzky v. The People*, 29 N. Y., 124.)

The judgment should be affirmed, but the case remanded to the court below, and the proper sentence be imposed.

All concur.

Judgment affirmed and ordered accordingly.

COURT OF APPEALS.

NEW YORK, 1874.

WOOD V. THE PEOPLE.

The prisoner was tried for perjury, at the Court of Sessions held in Washington county, by the county judge of Saratoga county, and the justices of the Sessions of Washington county. It appears that the judges who signed the bill of exceptions were not members of the court when the trial was had. A bill of exceptions was proposed on behalf of the defendant, and amendments thereto proposed by the district attorney, and such proposed bill and amendments were submitted to the judge who presided at the trial and he certified in what manner the exceptions should be settled, and the judge of Washington county adopted the papers thus certified as the bill of exceptions in the case.

Held, that it was competent for the parties to consent to the settlement, although they were different persons from those who sat upon the trial.

The assignments of perjury in the indictment were founded upon the evidence of the prisoner Wood, on the trial of an action of slander. The court was requested to charge the jury that it had not been proved that the testimony, upon which the perjury had been assigned, was material to the issue tried. The same request was made, separately, in respect to each particular statement of the prisoner, upon which perjury was assigned. These requests were refused, and exceptions taken. The jury rendered a general verdict of guilty.

Held, that it must appear, either from the facts set forth in an indictment for perjury that the matter sworn to and upon which the perjury is assigned was material, or it must be expressly averred, that it was material, and the materiality must be proved on the trial or there can be no conviction.

Held, that, if a person swears falsely in respect to any fact relevant to the issue being tried, then we think he is guilty of perjury, although the case failed from defect of proof of another fact, and although the other fact alleged had no existence. It is not necessary that the false statements should tend directly to prove the issue, in order to sustain an indictment for perjury. If the matter sworn to is circumstantially material or tends to support and give credit to the witness in respect to the main fact, it is perjury.

Mr. Tanner, for the prisoner.

Mr. Smith, for the people.

ANDREWS, J. The plaintiff in error was convicted at the Court of Sessions of the county of Washington, held in August, 1872, upon an indictment for perjury alleged to have

been committed on the trial of an action for slander at the Circuit Court in that county in 1871, brought by him against one Conant for charging him with killing and selling the beef of a diseased cow, knowing that it was diseased.) A writ of error was issued out of the Supreme Court, directed to the judges before whom the trial was had, commanding them to return the record and proceedings to that court, and a return having been made, the conviction was, after argument in the Supreme Court, affirmed. The case has, by writ of error, been brought into this court and is now before us for review. The error book contains the judgment record and a bill of exceptions, signed and sealed by the county judge and the justices of the Sessions of Washington county, at a term of that court held in August, 1873.

The point is taken, on behalf of the people, that the question arising on the bill of exceptions cannot be considered for the reason that it was not settled by the judges before whom the indictment was tried.

It appears from an inspection of the record that the trial court was composed of the county judge of Saratoga county, and the three justices of the Sessions of Washington county, and that the judges who signed and sealed the bill of exceptions were not members of the court when the trial was had. It also appears that, after the trial, a bill of exceptions was proposed on behalf of the defendant, and amendments thereto by the district attorney, and that the proposed bill and amendments were submitted to the judge who presided at the trial, who examined the papers and certified in what manner the exceptions should be settled, and the judges in settling the bill adopted the papers thus certified as the bill of exceptions in the case.

It is undoubtedly true that a bill of exceptions ought regularly to be settled by the judges before whom the indictment is tried. (2 R. S., 423, § 75; 739, § 21.) But we think it was competent for the parties to consent that the settlement might be had at a term subsequent to that at which the indictment was tried, and before the judges who might then compose the court, although they were different persons from those who sat upon the trial. And this, we think, must be presumed to have been the case in respect to the bill of exceptions in question. It was returned upon the

writ of error, and it does not appear that there was any objection to the settlement at the time it was made. If, for any reason, the bill of exceptions was improperly inserted in the record, the court, on an application to correct it, could give the proper relief. No such application appears to have been made, and to allow the objection to the regularity of the settlement to be taken for the first time on the argument of the case, would not be in the furtherance of justice, and the objection ought not to be entertained.

We are of the opinion that the bill of exceptions is properly before us, and that the exceptions contained therein are open for examination.

Conant, the defendant in the slander suit, justified in his answer the speaking of the words charged in the complaint, and alleged in general terms, that at or about a time stated, the plaintiff did kill and sell the beef of a diseased cow, knowing it to be diseased.

The assignments of perjury in the indictment are founded upon the evidence alleged to have been given by Wood on the trial of that action ; and it is not claimed by the counsel for the people that it was material, upon any issue in the case, except the issue raised by the justification.

The indictment contains five counts. The first count sets out the evidence given by the prisoner on his examination, embracing many particulars and more than twenty distinct and separate assignments of perjury in respect thereto. The most of them relate to the testimony of the prisoner as to the fact whether a certain cow bought by his father, in the fall of 1866, of Conant, and taken to the premises of the father, with whom the prisoner resided, and which was afterward, in December, 1866, killed and subsequently sold was, before and at the time she was killed, diseased, and to the further fact whether he knew of her diseased condition at that time. In his evidence he testified that the cow was not diseased when she was killed or while she was in his father's possession ; and he denied that she was lame or had any swelling or ulcer as other witnesses had stated. There are other assignments of perjury in this count, in respect to statements made by him upon the trial, which do not, upon their face, appear to have been material to the issue in the case.

At the conclusion of the testimony the court was requested to charge the jury that it had not been proved that the testimony, upon which the perjury was assigned, was material to the issue tried. The same request was made separately in respect to each particular statement of the prisoner upon which perjury was assigned. These requests were refused and exceptions were taken. The jury rendered a general verdict of guilty upon all the counts. The question is raised by these exceptions whether there was a failure to prove, in respect to all or any of the numerous statements upon which perjury was assigned, that they were material to the question and issue before the court. (*Dunckles v. Wiles*, 11 N. Y., 430.) It must appear, either from the facts set forth in an indictment for perjury that the matter sworn to and upon which the perjury is assigned was material or it must be expressly averred, that it was material, and the materiality must be proved on the trial or there can be no conviction. A false oath upon an immaterial matter will not support a conviction for perjury. (*Roscoe Cr. Ev.*, 758; 2 *Russ. on Crimes*, 639.)

If, therefore, there was a failure to show, in respect to any one of the assignments of perjury, that the matter embraced therein was material, the conviction must be reversed; otherwise, as the court cannot know upon what ground the jury proceeded, the defendant may have been convicted upon an assignment of perjury which related to testimony not material to the case. We have been referred to cases which hold that judgment will not be arrested upon a conviction for perjury where the indictment contains in one count several assignments, some of which are good and others defective. (*People v. Curling*, 1 J. R., 320; *Same v. Wiley*, 3 Hill, 213; *Comm. v. Johns*, 6 Gray, 274; *State v. Hascall*, 6 N. H., 352.) It will be presumed in such a case that the jury disregarded the defective assignments and proceeded upon the substantial and sufficient averments in the indictment. But when the attention of the court on the trial is specifically called to the question and the judge refuses to withdraw from the consideration of the jury those assignments which are defective in form, or which have not been sustained by proof, and exception is taken, the court cannot disregard the error. The exception to the refusal to

charge generally that none of the testimony upon which perjury was assigned had been shown to be material, was not well taken. This exception is sought to be supported on the ground that it does not appear that any evidence was given on the trial of the slander suit tending to show that the prisoner sold the beef of the cow to which his testimony referred, and that it affirmatively appears that the father owned the cow and sold the beef. This argument assumes that testimony, in order to be material, must relate not only to the issue in the cause, but to an issue which might be fully maintained by the party tendering it; in other words, that if the testimony relates to a fact or circumstance which is material as part of an entire case, the accused may escape conviction if he can show that another essential fact could not have been proved. If a person swears falsely in respect to any fact relevant to the issue being tried, then we think he is guilty of perjury, although the case failed from defect of proof of another fact, and although the other fact alleged had no existence. For instance, if in an action by the indorsee of a note against the maker, a defence was made which was admissible only on showing that the plaintiff took the note after it was due, a witness should falsely state that it was transferred before it was due, I cannot doubt he would be guilty of perjury, although no defence in fact existed. The evidence would be relevant to the cause, and it does not lie with the perjurer to say that if he had sworn to the truth the case for other reasons would have failed. (*Rex v. Rhodes*, 2 *Ld. Raymd.*, 887.) In respect to some of the statements upon which perjury is assigned, there was, I think, no proof of their materiality. There was a question made on the trial of the slander suit whether the diseased beef was taken to market at the same time with a lot of turkeys, and whether the beef and turkeys were taken in a sleigh from the house of the prisoner's father, and then transferred to a wagon at Mr. Nelson's, and whether Mr. Nelson helped unload the beef from the sleigh to the wagon. The prisoner testified that the beef was not taken at the same time with the turkeys, and that it was transferred to a wagon from the sleigh at Nelson's, and that Nelson assisted in transferring it. The indictment assigns as perjury that the beef was not transferred at Nelson's, and by a

separate assignment that Nelson did not assist in making the transfer. The indictment does not allege that either of these statements was material, nor do they appear to have been so, on a comparison of the statements with the issue in the pleadings or by any extrinsic proof. It is not necessary that the false statements should tend directly to prove the issue in order to sustain an indictment. If the matter falsely sworn to is circumstantially material or tends to support and give credit to the witness in respect to the main fact, it is perjury. (*Comm. v. Pollard*, 12 Mass., 220; 3 Greenl. Ev., § 197; Roscoe on Cr. Ev., 759.) If the statements in the assignments last referred to were material, it should have been shown. Their materiality cannot be inferred and they do not appear to have had any relation to the issue, either direct or collateral, or to the credit of the witness in respect to his other testimony.

For the error of the court in refusing to charge that these statements were not proved to be material, the judgment and conviction must be reversed.

All concur.

Judgment reversed.

NOTE.—Exceptions are now taken in criminal cases, and bills of exceptions are now settled according to the provisions of the Code of Criminal Procedure contained in chapter one of title eight of such Code.

Those provisions are as follows :

“§ 455. On the trial of an indictment, exceptions may be taken by the defendant, to a decision of the court, upon a matter of law, by which his substantial rights are prejudiced, and not otherwise, in any of the following cases :

1. In disallowing a challenge to the panel of the jury;
2. In admitting or rejecting testimony on the trial of a challenge for actual bias to any juror who participated in the verdict, or in allowing or disallowing such challenge ;
3. In admitting or rejecting witnesses or testimony, or in deciding any question of law, not a matter of discretion, or in charging or instructing the jury upon the law, on the trial of the issue.

“§ 456. A bill containing the exceptions must be settled and signed by the presiding judge, and filed with the clerk.

"§ 457. The bill of exceptions must be settled at the trial unless the court otherwise direct. If no such direction be given, the point of the exception must be particularly stated in writing, and delivered to the court, and must immediately be corrected or added to, until it is made conformable to the truth.

"§ 458. If the bill of exceptions be not settled at the trial it must be prepared and served within five days thereafter, on the district attorney, who may, within five days, serve on the defendant or his counsel, amendments thereto. The defendant may then, within five days, serve the district attorney with a notice to appear before the presiding judge of the court, at a specified time, whether in or out of court, not less than five nor more than ten days thereafter, to have the bill of exceptions settled.

"§ 459. At the time appointed, the judge must settle and sign the bill of exceptions.

"§ 460. The time for preparing the bill of exceptions or the amendments thereto, or for settling the same, may be enlarged by consent of the parties, or by the presiding judge, or by a judge of the Supreme Court, but by no other officer.

"§ 461. If the bill of exceptions be not served within the time prescribed in section four hundred and fifty-eight, or within the enlarged time therefor, as prescribed in the last section, the exceptions are deemed abandoned. If it be served, and the parties omit, within the time limited by section four hundred and fifty-eight, the one to prepare amendments, and the other to give notice of appearance before the judge, they are respectively deemed, the one to have agreed to the bill of exceptions, and the other to the amendments." Ed.

SUPREME COURT.

Third Department — New York, 1874.

WOODFORD v. THE PEOPLE.

The prisoner was indicted and convicted of arson in the first degree, in setting fire to certain dwelling-houses in the village of Canastota, to the number of thirty-five. On the trial the people elected to proceed as to one house only, and that was the house of Mary H. Parker.

Held, that it was proper to indict the prisoner as for one offence, and, provided the destruction of every house amounted to the same degree of arson, the indictment need contain but one count. Regarding the entire fire as one transaction, the burning, condition, situation and occupancy of the several houses, were simply matters of detail.

A motion by the prisoner's counsel was made to quash the indictment, and in arrest of judgment, on the ground that the indictment did not state there was some human being in each dwelling-house at the time the houses were fired or burned.

Held, that the first degree of arson requires the presence of some human being in the dwelling-house at the time the prisoner sets fire to or burns it. The statute describes the crime to be, "willfully setting fire to, or burning, in the night time, a dwelling-house in which there shall be, at the time, some human being." *Held*, further, that a fair construction of the words employed in the indictment charge the presence of a human being, in each of the houses, at the time they were burned.

William James, for the prisoner.

G. A. Forbes, district attorney, for the people.

LONDON, J. The prisoner committed but one act, and its consequences were the destruction of thirty-five dwelling-houses. We think it was proper to indict him as for one offence, and, provided the destruction of every house amounted to the same degree of arson, the indictment need contain but one count. (Wharton Cr. Law, § 391.) He should be held to have intended the natural and probable consequences of his wicked act. The wrong done, was done by him, and it was done with a malicious intent. That intent may not have originally embraced all the mischief he produced, and it may have embraced more. The malicious intent being granted, its extent must be gathered from the result, and, in the absence of evidence to the contrary, be

held commensurate with it. No man can shelter himself from punishment upon the ground that the mischief he did was wider than he intended. (Roscoe Cr. Evidence, 271, 272.) If the description of his crime embraced thirty-five houses, it was because he destroyed so many. If the multitude confused him, he caused the multitude. The people were not obliged to rest with one since the prisoner had not. The objection to the indictment for duplicity, in charging the burning of thirty-five houses, was therefore not well taken.

For the same reason, the people had the right to give evidence as to the burning of all of them. Regarding the entire fire as one transaction, the burning, condition, situation and occupancy of the several houses, were simply matters of detail.

When, at the opening of the evidence, the people elected to proceed as to the burning of one house only, waiving all right to convict as to any of the others, they threw away thirty-four chances of conviction, which, assuming the indictment to be correctly framed as to every house, they had the right to hold and urge against the prisoner. It is difficult to see how the prisoner was harmed by it. His counsel did not except. What he assented to then, he cannot urge as error now.

The prisoner's counsel further urged upon motion to quash the indictment, and in arrest of judgment after conviction, that the indictment was void for duplicity, upon the alleged ground that it did not state that there was some human being in each one of the dwelling-houses, but in one only, and therefore charged in each count the separate offences of arson in the first, and in the third degree. If the indictment does allege that there was a human being in some of the houses, and does not as to all, then the indictment is obnoxious to the objection. The first degree of arson requires the presence of some human being in the dwelling-house at the time the prisoner sets fire to or burns it; the third degree does not. These two degrees of arson, being two distinct statutory crimes of different grades of punishment, cannot be united in one count. (*The People v. Wright*, 9 Wend., 193; *The People v. Reed*, 1 Park., 481; *Dawson v. The People*, 25 N. Y., 399.)

The reason of the rule is, that if the jury are permitted to find a general verdict of guilty upon such a count, the verdict condemns the prisoner for the highest offence charged in it, when the fact might be that the jury only thought him guilty of the lesser crime; and also because some might find him guilty of one, and some of the other offence, and all agree upon neither, in which case he should not be convicted at all. We state the reason of the rule, to show that the rule itself, is without application in the present case. The people withdrew all claim to convict except with regard to the single house of Mary H. Parker. The judge distinctly told the jury that they must find the prisoner guilty of setting fire to that house, or acquit him; with this waiver by the people, and this charge by the court, it was of no moment to the prisoner whether the indictment improperly joined other offences with the one upon which only he was to be judged. If the allegations as to the others were erroneous, the errors were removed by the withdrawal of the charges.

The question was distinctly raised by the prisoner's counsel in his requests to charge and exceptions to refusal to charge, whether the indictment charges the prisoner with arson in the first degree in setting fire to the house of Mary H. Parker. If it does not, then the prisoner has been convicted of a crime with which he was not charged, and the conviction cannot be sustained. The point of this objection is, that the indictment does not specifically charge that at the time the prisoner set fire to her house, there was some human being in it.

Arson in the first degree, as described by the statute, consists of "willfully setting fire to, or burning, in the night time, a dwelling-house in which there shall be, at the time, some human being."

The indictment in the first count charges the prisoner with setting fire to the dwelling-house of Mary H. Parker, and the dwelling-house of several others, naming some, and describing others as "divers persons to the jurors unknown," and then uses these words: "there being then and there within the said dwelling-houses some human being." The second count used the same words to charge the presence of a human being at the time the houses were burned. Is it a fair construction of these words to say, that they do not

charge the presence of a human being in each of these dwelling-houses, but only charge the presence of one human being in some one of the multitude? The prisoner had a right to know, at and before the trial, whether the indictment charged the fact to be, that there was a human being in the dwelling-house of Mary H. Parker. If it did, he had to meet that charge placing his liberty for life, in peril; if it did not, then only for a short term of years. The indictment uses the precise words of the statute, and while it may be justly charged that the language is not explicit, we are sure that no one can read the indictment, without being convinced that it was the intent of the pleader to charge the presence of a human being in each of the dwelling-houses specified therein. We think it a fair construction of the words employed, to hold that they do so charge. This objection, therefore, fails.

Evidence was given by the people, under objection, showing the conduct and whereabouts of the prisoner for several hours preceding the fire. A hay barn was burned in the same village about three hours previous to the fire in question, and the prisoner was shown to have been seen in its vicinity shortly before and after the fire broke out. Had there been no burning of the hay barn, it would not be doubted that evidence might properly be given, showing the whereabouts and conduct of the prisoner shortly before the fire in question, especially if it bore upon his opportunity or guilty intent to do the act. This evidence seems to have been given with this view, and the judge in his charge cautioned the jury to give to it no other effect. We think that the criticism of the prisoner's counsel that proof of one offence was given in support of another is not warranted.

The prisoner's counsel requested the court to charge that if the fire did not reach the house of Mary H. Parker until after she was aroused, and she had time to escape before the fire reached her house, and she neglected to do it, it is not arson in the first degree. Mrs. Parker testified that she was aroused from her sleep by the alarm; that the fire had not then reached her house; that she threw on her wrapper, and, instead of instantly leaving, remained about five minutes to pick up some of her things, when the fire caught her

house. In view of these facts the judge properly refused the request. It would be requiring too much, to ask the inmates of an exposed house, to abandon their shelter and property at the earliest moment, out of any sentimental regard for the fate of the incendiary. Arson is an offence against property. It is aggravated when, in addition to the destruction of property, human life is thereby in danger of destruction. Because a person may or does escape with his life, does not prove that it was not in peril. The statute has made the fact, that some human being is in the house at the time it is set fire to, the test of the peril, and draws no distinctions as to its imminency. (*People v. Butler*, 16 John., 204; *People v. Orcutt*, 1 Park., 252.)

Several other objections were taken, which, we think, were properly disposed of by the learned justice upon the trial, and it is not necessary to discuss them.

The conviction should be affirmed.

Present:—*Bockes*, P. J., *Landon* and *Countryman*, JJ.

Conviction and judgment affirmed.

SUPREME COURT.

First Department—New York, 1876.

EVERS v. THE PEOPLE.

The defendant was convicted before the Court of General Sessions, of the city and county of New York, of an assault with intent to kill, or to do bodily harm. The defence was justification.

On the trial the court asked the question: "Evers, can you explain to me this thing; while Curran, that was able to whip you, kept picking at you for amusement, why should he have put his hand in his pocket after giving you three terrific licks in the face? what was the occasion of drawing a pistol?" To which the prisoner's counsel duly excepted.

Held, that the question excepted to was objectionable. The Recorder seems to have been impressed with the conviction that the complainant being the conqueror, it was absurd in him to resort to a weapon; but that was for the jury to determine, not upon the reasons or opinions of the defendant, but upon the facts and circumstances disclosed. We cannot say that the question did not do the prisoner any injury, and, upon well settled principles of evidence, that is sufficient to demand a reversal of the judgment.

William F. Howe, for the prisoner.

Benjamin K. Phelps, for the people.

BRADY, J.: The defendant was arraigned for an assault with intent to kill, or to do bodily harm. The defence was justification.

The evidence on the part of the prisoner, tended to show repeated acts of violence against him by the complainant, and threats against his life, which the prisoner asserted he believed he would carry out. On the occasion when the assault was made, for which the prisoner was tried, the complainant began the disturbance by assailing the former, as the prisoner stated, and he was sustained in material facts of his evidence thereupon by other witnesses. The question for the jury was, whether the prisoner was justified in believing himself to be in peril, and, under the rules of law, authorized to resort to the weapon used to protect himself. These rules were properly stated to the jury, and although it is apparent that the learned recorder entertained very decided views of the case presented, he cautioned the jury against their influence upon them, instructing them that it was their duty to decide the questions involved, and to decide them upon their own appreciation of the evidence. Upon this element of the charge, therefore, if there had been a valid exception, it would necessarily be held that there was no error committed. The expression of judicial opinion in these cases, has not been regarded as an erroneous exercise of judicial power.

Whether the prisoner was justified in doing what he did, depended upon the credibility given to either of the class of witnesses called respectively for the people and the prisoner. They were in conflict upon the origin of the fracas, and the details marking its progress and consummation, and, therefore, the verdict rendered must be conclusive, unless some error arising or presented upon exception, was committed during the trial.

The prisoner, upon his examination, described a motion of the complainant's hand by him during the collision between them, from which he thought the latter designed to take a pistol from his pocket, and in reference to that cir-

cumstance, the learned recorder asked this question: "Evers, can you explain to me this thing: while Curran, that was able to whip you, kept picking at you for amusement, why should he have put his hand in his pocket after giving you three terrific licks in the face? what was the occasion of drawing a pistol?" To which the prisoner's counsel duly excepted. The prisoner answered: "Your honor, I am no fighting man; he is a very desperate man; I do not fight;" and it was followed by the further question: "I don't see why a man whipping you every day, that you should suspect that he would draw a pistol," which was answered, and without exception, as follows: "He was threatening my life all the time he seen me; he has thrown a man overboard; he was threatening me all the time, calling me never by my right name; I have a license to keep a sailor's boarding house; he has not; it is not lawful for him to do it."

The question excepted to was objectionable. It called upon the prisoner to furnish the reason, or state a motive for an act which he regarded as indicative of a design to kill him, or do him some bodily harm, and which was in fact the pivotal part of the defence. He was not bound to explain the complainant's conduct, or to express any opinion upon his motive, object or intent, or to give any reason for any or either of them. He was under no obligation to answer, therefore, the question propounded, and should not have been subjected to it. That course of inquiry might be indulged on the examination of the complainant, and it was a proper consideration of the jury in determining upon the evidence whether the prisoner was warranted in believing himself in peril. The prisoner was to be held bound to answer as to the facts and circumstances, and not to give philosophical deductions. In establishing his defence, it was sufficient for him to show a reasonable ground for apprehending a design to take his life, or to do him some great bodily harm, and also a reasonable ground to believe the danger imminent that such design would be accomplished, although it might afterward turn out that such appearances were false, and there was in fact no such design, or any danger that it would be accomplished. The accused must, in such cases, decide at his peril upon the force of the circum-

stances in which he is placed, for that is a matter subject to examination. (*Shorter v. The People*, 2 N. Y., 193.)

The question, indeed, called upon the witness to explain two things, namely: why should the complainant, under the circumstances, put his hand in his pocket; what was the occasion of his drawing a pistol. His response, as an answer to the question, was a failure. He explained neither. He reiterated some of the elements of the defence, but gave no explanation. His failure in that respect may have prejudiced his case. It is impossible for us to say that it did not. The object of the question, or its purport, it is not difficult to understand. The learned recorder, when it was asked, seems to have been impressed with the conviction that the complainant, being the superior power—the conqueror so to speak—it was absurd in him to resort to a weapon; but that was for the jury to determine, not upon the reasons or opinions of the defendant, but upon the facts and circumstances disclosed. It is not improper to suggest that the history of violence, as revealed by cases of this character, well demonstrates that the victor does not always rest upon his triumph, but completes it by unnecessarily killing his victim. His passions sometimes govern, and not his reason, and he is not, therefore, always rational in his conclusions upon the events in which he has taken part. It did not follow, as a necessary consequence, that the complainant having struck the prisoner “three terrific blows in the face,” and being apparently master of the situation, he would not make any other hostile demonstration, or give any other evidence of an intention to continue the violence. At all events, we cannot say that the question did not do the prisoner any injury; that it is clear beyond rational doubt that no harm was done to the party objecting; and, upon well settled principles of evidence, that is sufficient to demand a reversal of the judgment. We cannot say that the question and the answer given, would not have a tendency to either excite the passions, arouse the prejudices, awaken the sympathies, or warp or influence the judgments of the jurors in any degree, and thus overcome the decisions on the subject. (*The People v. Gonzales*, 35 N. Y., 59; *Vandervoort v. Gould*, 36 id., 644; *Anderson v. Rome, etc., R. R. Co.*, 54 id., 334.)

It may be further said, that when a person is subjected to maltreatment by another, he may seek protection from the authorities, and even that it is his duty to do so, as a conservator of the peace, but the omission to do it does not in any way deprive him of the protection of the law, and when assailed, he may defend himself in the same manner, and to the same extent, and by the same means, as if he had sought the protecting arm of the law. The question is not, in such cases, whether the prisoner has sought that remedy, but whether he was in imminent peril, or was justified in believing himself to be, when he did the act complained of. (Cases cited, *supra*.) The charge of the learned recorder, that if the prisoner "believed that his life or person was in jeopardy and peril, by the alleged repeated assaults made by the complainant, it was his duty to have invoked the aid of the authorities to aid in saving him from the infliction of any wrong, or punishing the offender for a wrong committed; all the prisoner had to do, was, to make a complaint before the magistrate, and the complainant would have been forced to have given bonds to keep the peace, to deter him from the commission of any violence," and to which exception was taken, was therefore foreign to the issue, and erroneous. It was calculated either to lead the jury to the conclusion that the duty suggested was so coupled with the other elements of justification, as to make that defence incomplete without its performance, or to the conclusion that the prisoner had, by omitting to do as suggested, failed to do his duty, and was censurable. In either point of view, it was objectionable. It had, and it is said with great respect, no pertinent application to the facts developed, and had no legitimate bearing, therefore, upon the issue to be determined.

We think the judgment should be reversed, and a new trial ordered.

DAVIS, P. J., and DANIELS, J., concurred.

Judgment reversed, and new trial ordered.

SUPREME COURT.

First Department. — New York, 1874.

FOSTER V. THE PEOPLE.

The prisoner was indicted for burglary in the third degree, in breaking and entering a store in the night time, and stealing therefrom certain goods kept there for sale.

On the trial it was shown that the scuttle of the store had been forced open, and the lock of the back door had been burst open, through which the presumption was that the burglars had entered.

Held, that this evidence established the burglary.

Among the articles missed from the store in the morning, when the burglary and theft were discovered, was a quantity of cigars, not mentioned in the indictment, that had disappeared with the articles which were set forth, and proof, under objection, was allowed of the fact.

Held, that, it was a part of the same act which constituted the crime charged, and admissible as a circumstance showing its nature and extent.

A box of burglar tools, found in the office of Adams Express Company, at Boston, shortly after the burglary, was produced and identified at the trial. It was shown that the box, containing the tools, had been made for the prisoner; had been taken to the prisoner's residence, and sent away from there in an express wagon. The box was marked Foster, and the prisoner was present at the express office when it was found there.

This evidence was objected to on the ground that the box was in no way proven to be connected with the prisoner.

Held, that, in view of the evidence given upon the subject, and the form of the objection, the reception of the evidence was not error.

After the box and contents were received in evidence, objection was made to a witness giving the names of the articles in the box, and a motion was made, after its reception, to strike out such evidence.

Held, that no error was committed in the receiving, or refusing to strike out the evidence objected to. By the form of the objection, it was conceded that the box and its contents were proper evidence, if the prisoner had been sufficiently shown to have been connected with them. After this concession, and the box and its contents were received in evidence, it was too late to allow the motion to strike out the evidence to prevail.

William F. Howe, for the prisoner.

B. K. Phelps, district attorney, for the people.

DANIELS, J. The prisoner was convicted of the crime of burglary in the third degree, committed by breaking and entering a store in the night time, and stealing therefrom

certain goods kept there for sale. It was claimed in his behalf that the crime of burglary was not established by the evidence. But, as it appeared that the scuttle had been forced open, and the lock of the back door had been burst off, through which the entry in the store had probably been made, no reason existed for the support of this objection.

Among the articles missed from the store in the morning, when the burglary and theft were discovered, was a quantity of cigars, not mentioned in the indictment. That they had disappeared with the articles which were set forth, was allowed to be proven by the court. Their theft constituted a part of the transaction on which the indictment was found, and, for that reason, no well founded objection could be taken to the allowance of proof of the fact. It was a part of the same act which constituted the crime charged, and admissible as a circumstance showing its nature and extent.

A box containing burglars' tools, found in the office of the Adams Express Company, at Boston, shortly after the burglary, was produced and identified at the trial. By a witness, residing opposite to the prisoner, it was shown that the box had been made for him by a carpenter working in the vicinity, and that it had afterward been taken by the prisoner to his own residence, and sent away from there in an express wagon. It was marked with the name of Foster, and found at the express office at Boston, while he and another person were there for the probable purpose of taking it away. This was certainly sufficient to connect the prisoner with it, and to warrant the court in receiving it as evidence, as long as no other or different objection was taken to its admissibility. It was simply objected to, because it was in no way proven to be connected with the prisoner. In view of the evidence given upon the subject, this objection was without the least colorable support.

After the box and its contents had been received in evidence, objection was made to the witness stating what the jimmies, drill and fuse were; and, after the prosecution rested, a motion was made to strike out the evidence, given as to the contents of the box, and the description of the instruments. But as the box and its contents had been received and placed before the jury, without violating any of the prisoner's rights, no harm could be done to him by

permitting the officer to name the instruments produced. He waived the right to object to them as evidence, by specifically restricting and confining his objection to a particular reason, having no foundation in the case. After that, no valid objection could exist to evidence showing the names of some of the articles contained in the box. By the form in which the objection was made, the defendant, in substance, conceded that the box and its contents were proper evidence, if he had been sufficiently shown to be connected with them. After that virtual concession, and the box and its contents were received in evidence and the prosecution rested the case, it was too late to allow the motion to strike out the evidence to prevail. (*Quin v. Lloyd*, 41 N. Y., 349.) No other objections have been taken to the propriety of the prisoner's conviction; and, as those considered can neither of them be maintained, the judgment should be affirmed.

DAVIS, P. J., and BARRETT, J., concurred.

Judgment affirmed.

SUPREME COURT.

First Department—New York, 1874.

LENAHAN V. THE PEOPLE.

The prisoner was convicted upon the third count of the indictment which charged him with committing an assault and battery with intent to kill, by such means or force as was likely to produce death. It is claimed that the conviction cannot be sustained, because that count contains no averment that the assault was "with a deadly weapon."

Held, that the statute upon which the third count of the indictment is drawn, is by no means limited to assaults and batteries with intent to kill, by means of any "deadly weapon," that is only one of the alternatives of the provision; the other is an assault and battery, with like intent, by such means and force as was likely to produce death. The latter offence is accurately and particularly set forth in the count.

The court charged the jury: "And here let me remind you that the complainant testified (and that you may consider an important piece of evidence), that when he was walking along and heard this stealthy step behind him, the street appeared to be deserted. You will recollect the time—it was on the fifth of August; you won't forget the place—it was the Fifth avenue; you

have a right, of your own knowledge, to take notice of the circumstance that at that time, the fifth of August, no part of the city was probably more likely to be deserted, even as early in the night as nine o'clock, than that part of the avenue," to the last sentence of which the counsel for the prisoner excepted.

Held, that the exception was well taken. The condition of the street, as to whether deserted or not, at the time and place described, was a fact to be proved, like other circumstances in the case, and whether a certain street in a large city is likely to be deserted at nine o'clock in the evening, is clearly not within the rule of evidence which justifies a judicial notice of that fact.

William F. Howe, for the prisoner.

B. K. Phelps, district attorney, for the people.

DAVIS, P. J.: The plaintiff in error was convicted on the third count of the indictment. It is claimed that the conviction cannot be sustained, because that count contains no averment that the assault was "with a deadly weapon." The count charges that the prisoner feloniously made an assault upon one Horace Galpen, and him, the said Horace Galpen, with a certain piece of lead, which the said Thomas Lenahan in his right hand then and there had and held, wilfully and feloniously, did beat, strike, cut and wound, the same being such means as was likely to produce the death of him, the said Horace Galpen, with intent him, the said Horace Galpen, then and there feloniously and wilfully to kill.

The statute upon which the count of the indictment is drawn, is by no means limited to assaults and batteries with intent to kill, by means of any deadly weapon. Its language, so far as it bears upon this case, is: "Every person who shall be convicted * * * * of an assault and battery upon another, by means of any deadly weapon, or by such other means or force as was likely to produce death, with intent to kill," shall be punished, etc. An assault and battery by means of any deadly weapon, with intent to kill, is only one of the alternatives of the provision; the other is an assault and battery, with like intent, by such means and force as was likely to produce death. And the latter offence is accurately and particularly set forth in the count. We think there is no merit in the point raised by counsel.

A very large number of objections and exceptions were made and taken on the trial, most of which were altogether frivolous.

Indeed, if we regard the error book as containing a fair photograph of the proceedings upon the trial, it is painfully apparent that the conduct of the prisoner's counsel in presenting his objections and taking exceptions, was so discourteous and indecorous toward the court as to have deserved severe censure. We do not regard it important to consider all the exceptions argued before us, because our conclusion upon one of them renders it necessary to reverse the judgment, and order a new trial.

The crime for which the plaintiff in error is convicted, was committed at about nine o'clock of the evening of the fifth day of August last, at a point on Fifth avenue near Fifty-fourth street. The blow was struck by a person who stealthily approached Mr. Galpen from behind. Mr. Galpen was able to give only a general description of the person, and identify the prisoner with him, by saying that the person he saw "was about the height and build and general appearance of the prisoner * * * and had on a dark straw hat, of a rather peculiar shape, and also a dark coat." No witness saw the blow struck, but very strong circumstantial evidence was given on the part of the prosecution to show that the prisoner was the guilty person. One of the circumstances was the deserted condition of the avenue at the time, and that nobody but the prisoner was seen near the spot where the occurrence happened.

The prisoner swore, in substance, that he did not strike the blow; that he had come to Fifty-first street to meet a female according to appointment, and there saw a woman and several men having some difficulty; that, upon the outcries of the woman, a police officer came, and that fearing he would be clubbed, he ran up Fifth avenue toward Fifty-fourth street, and, while running, heard Mr. Galpen's cry of murder, and saw him running across the avenue; that he kept on to the place where Galpen was when struck, and there saw and conversed with the people's witnesses (who had before stated their conversation with him), and that he ran away from that point down Fifty-fourth street, fearing that he might be arrested as one of the persons who

had caused the outcries of the woman on Fifty-first street. The prisoner's counsel urged the theory upon the jury, that the blow was struck by some person who had been concealed in an area, and suddenly had sprung out upon Galpen, and then fled or concealed himself as the prisoner was approaching from fifty-first street. In view of this testimony and theory upon the part of the prisoner, it is quite apparent that the condition of Fifth avenue, as to whether it was deserted at the time, or whether persons were passing along it in that vicinity, became a question of some materiality; and on this subject the learned judge, in the course of his charge said:

"And here let me remind you that the complainant testified (and that you may consider an important piece of evidence), that when he was walking along and heard this stealthy step behind him, the street appeared to be deserted. You will recollect the time—it was on the fifth of August; you won't forget the place—it was the Fifth avenue; and you have a right, of your own knowledge, to take notice of the circumstance that at that time, the fifth of August, no part of the city was probably more likely to be deserted, even as early in the night as nine o'clock, than that part of the avenue."

To the last sentence of this portion of the charge, the prisoner's counsel excepted. We think the exception was well taken. The condition of the street, as to whether deserted or not, at the time and place described, was a fact to be proved, like other circumstances in the case; and if the proof on that subject was insufficient or unsatisfactory, the prisoner was entitled to any advantage that might grow out of that fact. The evidence could not be helped out by the jury, by taking notice from their own knowledge, that as early as nine o'clock of the night of the fifth of August, that part of the Fifth avenue was more likely to be deserted than any other part of the city. It is not important whether or not we think that this charge probably had no material influence on the minds of the jury. We cannot, with certainty, be legally assured that it did not, and therefore we cannot treat it as having worked no legal prejudice to the prisoner. Possibly the jury may have given less consideration to the prisoner's own statement, by casting this notice

from their knowledge into the scale against it. There are many things of which courts and juries may take judicial notice, without evidence to prove their existence, extent or validity; the general statutes, the rules of common law and the decisions of the superior courts, (*Browne v. Scofield*, 8 Barb., 239; *People v. Herkimer*, 4 Cowen, 345); the jurisdiction and sovereignty exercised *de facto* by their own government, (*People v. Breese*, 7 Cowen, 429; *Chapman v. Wilber*, 6 Hill, 575; *Bronson v. Gleason*, 7 Barb., 472); the local divisions of their own county, and the relative positions of such divisions; who are public officers elected or appointed under general statutes, (*People v. Nevins*, 1 Hill, 154); what rivers are public highways, (*Browne v. Scofield*, 8 Barb., 239); the common and ordinary modes of transacting commercial business; the ordinary duration of human life, as a scientific fact, (*Johnson v. H. R. R. Co.*, 6 Duer, 634); the meaning of English words and terms of art; the ordinary measurement of time into years, seasons, months and days; and other facts of universal experience and acceptance, (2 Wait's Law and Pr., 366 *et seq.*); but no authority has come within our observation that justifies judicial notice, or notice upon the personal knowledge of the court or jury, (*Wheeler v. Webster*, 1 E. D. Smith, 1; *Wilkie v. Bolster*, 3 id., 327), of the condition of the streets of New York, in any respect, at any time or place.

The remark of the learned judge was, doubtless, a hasty and inadvertent one, but it unfortunately falls, when excepted to, within that class of errors which courts of review are not at liberty to disregard.

The judgment and conviction must be reversed, and a new trial ordered.

DANIELS, J.: The prisoner was tried and convicted of the crime of an assault with intent to kill.

The offence was committed about nine o'clock in the evening of the fifth day of August, 1874, on Fifth avenue, between Fifty-third and Fifty-fourth streets, in the city of New York. There was no substantial doubt, under the evidence, of the commission of the crime by some person. Whether the defendant was that person, was the real point in controversy. The evidence given for the purpose of

establishing the fact that it was he who committed the crime, was circumstantial in its character, and it in part consisted of proof that the street, at the time, was generally deserted at that point, and the prisoner was discovered standing near the place where the crime was committed, very near the time of its perpetration. That the street was actually deserted at that early period of the evening, was not conclusively shown, for the complaining witness simply stated that it appeared to be in that condition; that it was very much so for two or three blocks. Whether he was accurate in his recollection on this subject, was a material circumstance in the case, for if he was right in that respect, then the circumstance that the prisoner was found in the immediate vicinity of the place where the crime was committed, very soon afterward, showed that he probably was so situated that he might have committed, and, if no other persons were about there, afforded reason for believing that he was the guilty person. This fact was one which directly tended to establish the guilt of the prisoner, and the more strongly it was fortified, the more satisfactory would be the presumption against him which that circumstance would warrant. For the manifest purpose of allowing the jury to consider it as an established fact in the case, the court charged them that they had a right, of their own knowledge, to take notice of the circumstance, that, at that time, the fifth of August, no part of the city probably was more likely to be deserted, even as early in the night as nine o'clock, than that part of the avenue. The court evidently perceived the importance of this circumstance in its bearing upon the probability of the guilt of the prisoner, and therefore allowed the jury to establish it by their own knowledge, in case the evidence proved unsatisfactory in that respect. What that knowledge might be, neither the prisoner nor his counsel had the means of knowing. So that, upon this portion of the case, he was probably tried upon evidence, of the extent and effect of which, both were wholly ignorant. The fact referred to was not one which could be regarded as of general notoriety, and for that reason proof was necessary to establish its existence. And that proof the prisoner was entitled to hear, and be at liberty to controvert. The rule would be an exceedingly dan-

gerous one, which would leave the jury at liberty to supply defects in the case of the prosecution or defence from their own knowledge, and it has no authority to sustain it. The farthest that the courts have ever gone in that direction, has been to take notice of whatever ought to be generally known within the limits of their jurisdiction, (Greenleaf on Evidence, § 6, p. 10; *Smith v. N. Y. Central R. R. Co.*, 43 Barb., 225, 231; *Swinnerton v. Columbian Ins. Co.*, 37 N. Y., 174, 189); and whether a certain street in a large city is likely to be deserted at nine o'clock in the evening, is clearly not within that rule.

There may very well have been and probably were persons upon the jury that tried the prisoner, who never were on that part of Fifth avenue, at nine or near nine o'clock in the evening in the month of August. And yet, if others had been there sufficiently to know the nature of the street at that time, the jury were left at liberty to act upon their knowledge. That gave the jury the power to act upon simple unsworn evidence of the existence of a material fact, and it was in direct violation of the well settled rules of law. If all the jurors had been upon that portion of the avenue, and had observed its deserted appearance on other occasions, it would not follow from that fact, that it was in that condition on the evening in question. And they would not be justified in concluding that such was the fact at that time, from observations of that nature. The conclusion in that state of the case might or might not be a correct one. And where it is attended with such a state of uncertainty, it should be established by evidence, and not left to be conjectured by the jury. Upon the impropriety of the course pursued in this respect on the trial of the prisoner, nothing further need be added than what was said in the case of *People v. Zeiger* (6 Parker, 355).

The prisoner's counsel excepted to what was said upon the subject by the court to the jury. Many other exceptions were taken to the charge, not now requiring examination, and also to evidence received, which was of an exceedingly questionable nature, to say the least of it. But as that was merely pertinent to the fact of the crime having been committed, which was conceded through the case, it could not possibly have prejudiced the prisoner, and for

that reason would not constitute any proper ground for directing a new trial.

But leaving the jury at liberty to conclude from their own knowledge, that the portion of the avenue where the offence was perpetrated, was likely to be deserted at the time when it was committed, and, for that reason, to place the weight of that circumstance against the prisoner in considering the probability of his guilt, was a manifest error. And for that the judgment should be reversed, and a new trial ordered.

Judgment and conviction reversed, and new trial ordered.

LAWRENCE, J., concurred.

COURT OF APPEALS.

NEW YORK, 1874.

THE PEOPLE v. DOHRING.

The prisoner was tried and convicted by the Court of Sessions of the county of Niagara, of the crime of rape. On the trial one of the justices of the Sessions left the bench, while the trial was in progress, and was sworn and examined as a witness on the part of the prisoner, and was subsequently recalled and examined for the prosecution, in both cases without objection. A motion in arrest of judgment was made, on the ground that the court had lost jurisdiction of the case by the justice of the Sessions leaving the bench to take the witness stand. The motion was denied.

Held, that the court did not lose jurisdiction of the case because one of its members left the bench to stand for a time, in the same room, in the witness box.

Held, also, that it was error to permit the justice of the Sessions, a member of the Court, to be sworn and testify as a witness. Not because in this instance any harm came either to the people or to the defendant; but because such practice, if sanctioned, might lead to unseemly and embarrassing results, to the hindering of justice, and to the scandal of the courts.

The court was asked to charge the jury, that they must be satisfied from the evidence, before finding the prisoner guilty, that the prosecutrix resisted him to the extent of her ability, on the occasion it is alleged the defendant committed the offence charged against him. The court declined to charge as requested.

Held, that the refusal was error. It was to the extent of her ability, and not only that, but to the extent of her ability *on that occasion*, to which the request to charge asked that the attention of the jury be directed. It is the

law of this crime, in this State, that the woman must have resisted to the extent of her ability, on the occasion on which she alleges that this grievous wrong was done her.

R. W. Peckham and M. M. Southworth, for the people.

W. S. Farnell, for the prisoner.

FOLGER, J. It has been held that the two justices of the Sessions are indispensable to constitute a legally organized Court of Sessions, and that neither can be dispensed with, any more than a county judge. (*Blend v. The People*, 41 N. Y., 604.) The question there arose, however, upon objection and exception taken by the plaintiff in error, and was passed upon as an error, and not as a matter affecting the jurisdiction of the court. The court was held disorganized, by one of the justices of the Sessions, who had taken part in the proceedings on the trial for a time, after that, absenting himself from the place where the court was held, and not reappearing. It is said there, that it was not the case of a member of the court leaving the bench for a few moments, intending to return, but a total abandonment of the trial, in consequence of which one-third of the court was changed. It there appears that another justice of the peace was called by the circuit judge to the vacant place. In the case in hand, the justice of the Sessions who was sworn as a witness did not leave the court room while the trial was progressing; he did not abandon the trial; he left the bench for a space, intending to soon return to it, and did soon return. The mere absence from the this bench, while he was in the witness box, did not bring case within that above cited. If the Niagara County Sessions lost jurisdiction of this case, it was not because any of the members of the court were not present at the trial ready to perform the duty assigned to them by the laws. The court had, in the first instance, obtained jurisdiction and was in the exercise of it. Did it lose it because one of its members was called from his place on the bench to stand for a time in the witness box and give testimony? We are inclined to think that it was error to permit him, to take his place and be sworn and testify, as a witness. It was erroneous, not because in this instance any harm came either to

the people or to the defendant, for neither made objection, and both consented; but because such practice, if sanctioned, may lead to unseemly and embarrassing results, to the hindering of justice, and to the scandal of the courts. Thus, it has been sanctioned that two of the members of a court constituted by special commission, might be sworn and testify as witnesses against one on trial before it. But in that case it would seem that without them there was a court of legal fullness and capacity to conduct the business; for they did not, after being improved as witnesses, return to their seats on the bench. (*Rex v. Hacket*, Kel., fol. 12, cited in *Hawk. P. C.*, chap. 46, § 17.) It is asserted that in *Rex v. Lee* and *Reg. v. Blunt* (1 St. Tr., 1403, 1415), in the year 1600, POPHAM, Ch. J., was both judge and witness; but one would not wish to build on the precedents alone of those trials in those times. When a nobleman is tried by the House of Lords, any of the peers is a competent witness. (*Lord Stafford's Case*, 7 How. St. Trials, 1384, 1458, 1552; *Earl of Macclesfield Case*, 16 id., 1252, 1391.) In those cases, certain lords were not only witnesses, but afterward gave their votes upon the question, guilty or not guilty. But the same reason was there, that without them, peers enough were present to form a court. An additional reason is given also, that they acted in the capacity of jurors as well as of judges; and it is settled, that a juror may be a witness on a trial before himself and his fellows, first being sworn as a witness, beside his oath as a juror. (*Rex v. Rosser*, 7 C. & P., 648; *Manley v. Shaw*, Car. & M., 361; *Anon.*, 1 Salk., 405; *Bennett v. Hundred of Hartford*, Styles, 233; *Fitz James v. Moys*, Siderfin, 133.) But where the judge, who is called to the witness box, is actually trying the cause, and his continuance in the action as judge is necessary to the seemly and proper trial of the cause, then he may not become a witness; it is error so to do, and if objection be made, and exception taken, it is fatal error. In *North v. Champernoou* (Cases in Ch., pt. 2, p. 78), it was held: If a commissioner in a cause be himself examined as a witness, he must be first examined; and if others be before him examined in his presence, he cannot be afterward examined, having heard the former examinations. A commissioner who had so done, came up afterward and was

examined in court; but his deposition was suppressed on motion. In *Ross v. Buhler* (2 Martin [N. S.] [La.], 312), it was held, that one cannot be examined as a witness at a trial where he sits as judge. One of the reasons there given does not apply to the case in hand. It was asked there, who is to administer the oath? But that was done in the court below, in the case in hand, by the clerk. It is though, as applicable in this case as that, the consideration that the judge is to determine on his own competency, and whether to give a nonsuit in a civil case, or to instruct the jury to acquit in a criminal one. (*The People v. Bennett*, 49 N. Y., 137.) If a judge is put upon the stand as a witness, he has all the rights of a witness, and he is subject to all the duties and liabilities of a witness. It may chance, that he may for reasons sufficient for himself, but not sufficient for another of equal authority in the court, decline to answer a question put to him, or in some other way bring himself in conflict with the court. Who shall decide what course shall be taken with him? Shall he return to the bench and take part in disposing of the interlocutory question thus arising, and upon the decision being made, go back to the stand, or go into custody for contempt? The first would be unseemly, if not unlawful, for it would be passing judicially upon his own case. The last would disorganize the court and suspend its proceedings. Other like results may be conceived as possible, equally as contrary to the good conduct of judicial proceedings. (*Reg v. Gazard*, 8 C. & P., 595; see an interesting foot-note, 1 Campbell's Lives Ch. Jus., 166.) Therefore the inclination of the courts has been to hold, that when it is necessary for the conduct of the trial that one should act as judge, he may not be called from the bench to be examined as a witness; but when his action as a judge is not required, because there is a sufficient court without him, he may become a witness, though it is then decent that he should not return to the bench. (See, also, *People v. Miller*, 2 Park. Cr., 197; *Morss v. Morss*, 11 Barb., 510.) In the case here, the justice of the Sessions who was examined as a witness was a necessary part of the court, without whose continued presence and assisting action it would have been broken up, as we have seen from *Blend v. People* (*supra*). It was erroneous for him to be-

come a witness in the case. The error is not available here, because he was examined by the consent of the people and the prisoner. But the fact is not relied upon as error. A more fundamental position is taken. It is insisted that the court became no court, and the county judge and the justices of the Sessions lost jurisdiction of the case. We are not of that mind. All the constituents of the Court of Sessions were together in one place. All and each were ready and able to perform each and every duty incumbent upon them. That one of the members of the court was not in the place in the room customary for one to occupy holding his office, did not disorganize and disrupt the court. If so, a temporary absence from the bench for any purpose would work the same result. *Blend v. People (supra)* pronounces against such effect.

We have seen that a juror may be sworn and give his testimony to the court and to his fellows without breaking up the panel, yet he for the moment may be out of the jury box and performing a double duty, rendering his testimony as a witness, and noting its effect in aiding or abating the force of that which had gone before it. The attitude of a judge standing as a witness is not different in result upon his judicial function. He still retains it and is still in the exercise of it, still has jurisdiction of the case before him, together with his fellows on the bench. All of the component parts of the court are present together and co-operating, all the requisites of jurisdiction still exist as lively as when the trial began. There was no physical impossibility, as there was in *Blend v. The People (supra)*, in Justice BAKER at any moment on the arising of a question asking a decision from the bench, joining with the other members of the court in arriving at and pronouncing it. *Cancemi's Case* (18 N. Y., 128), and others (*The People v. Campbell*, 4 Park., 386; *Grant v. The People*, id., 527) are cited. They are not applicable. In the first, confessedly, there was not present for a part of the trial, nor on the rendition of the verdict, a full and constitutional panel of jurors. One had been withdrawn from the panel and had been dismissed from the case, and but eleven remained doing the duty which by law could be done only by twelve. It was held that consent in a criminal case would not give jurisdiction

to a tribunal not known to the law. *The People v. Campbell* is like it. It holds that where a court is without jurisdiction, consent cannot give it in a criminal case. *Grant v. The People*, holds that an issue upon a special plea to an indictment can only be tried by a jury, and consent cannot give jurisdiction to the court to try it without a jury. But here, as we have shown, the tribunal created by the law, had regularly acquired jurisdiction of the case, and remaining in due and orderly session, retained it to the end, without aid from the consent of the parties, or either of them.

We do not consider whether this question comes properly before us on the papers, preferring to dispose of it as if it did.

The prisoner's counsel took several exceptions on the trial to the rulings of the court on the admission and rejection of testimony. He also took an exception to the refusal of the court to direct a verdict, on the ground that there was no legal evidence of the crime having been committed. It is not necessary to determine whether these exceptions were well taken. There is another exception in the case, which requires an affirmance of the judgment of the General Term. The same question on the admissibility of evidence may not arise again, and we cannot add anything to what was said by CHURCH, Ch. J., in *The People v. Bennet* (*supra*), upon the power and the duty of the court to advise the jury to give a verdict of acquittal, when the evidence is too slight to warrant a conviction.

The counsel for the prisoner asked the court to charge the jury, that they must be satisfied from the evidence, before finding the prisoner guilty, that the prosecutrix resisted him to the extent of her ability, on the occasion. The court declined to charge the jury in those words, but did charge that the act must have been done by force, and against the will and resistance of the prosecutrix, without saying how forcible and continued, or how feeble and yielding that resistance might be. The counsel excepted to the refusal to charge and to the charge as made. There is no error in the charge as made. The prisoner was indicted under the statute declaring it a felony to forcibly ravish any woman of the age of ten years or upwards. (2 R. S., 663, § 22, sub. 2.) The charge, as made, did in general terms express the

facts which make the crime. The act to be a crime (so far at least as this case is concerned), must be done by force, and against the will and resistance of the woman. Coupled with the refusal to charge as requested, it failed, however, to express all that it was necessary for the jury to find. The resistance must be up to the point of being overpowered by actual force, or of inability from loss of strength the longer to resist, or from the number of persons attacking, the resistance must be dangerous or absolutely useless, or there must be duress or fear of death. (*Reg. v. Hallett*, 9 C. & P., 748; 1 Hawk. P. C., chap. 41, § 2.) In the case here, there is no evidence of inability from loss of strength longer to resist; there was but one for the prosecutrix to oppose, and he a man in years; there was no duress nor reason to fear death; there were no threats, instead thereof there were promises and words of palliation and persuasion; there was nothing to show that resistance was absolutely useless; she had possession of her faculties of mind and body, and retained her consciousness; she was then capable of resistance up to the point of being overpowered by actual force. In *Reg. v. Hallett*, the jury was instructed that if they thought from all the circumstances, that although when the prosecutrix was laid hold of, it was against her will, yet she did not resist afterwards, because she in some degree consented to what was done to her, they ought to acquit of the charge of rape; and they were also told that they would have to consider whether the female made every resistance that she could. The text-books speak thus: "It must appear that the offence was committed without the consent of the woman, but it is no excuse that she yielded *at last to the violence, if her consent was forced*, from her *by fear* of death or by duress. (Roscoe's Cr. Ev., 6th Lond. and 6th Am. ed., 806; 1 East P. C., 444, § 7, and citations.) It is an extreme which they put, that shall be no excuse. So in Viner it is laid down, that a woman cannot be ravished by one man without some extraordinary circumstances of force. (18 Viner Ab., 155, Rape, pl. 11.) In *The People v. Abbot*, 19 Wend., 192, Cowen, J., says: "Any fact tending to the inference that there was not the utmost reluctance and the utmost resistance, is always received." Why, if the jury are not to inquire whether there

were the utmost reluctance and the utmost resistance? This saying has been cited with approval in more than one instance. (*The People v. Morrison*, 1 Park. Cr., 625; *The People v. Quin*, 50 Barb., 128; *Reynolds v. The People*, 41 How. Pr., 179.)

The request to charge is not beyond the limit of the rule. Certainly, if a female, apprehending the purpose of a man to be that of having carnal knowledge of her person, and remaining conscious, does not use all her own powers of resistance and defence, and all her powers of calling others to her aid, and does yield before being overcome by greater force, or by fear, or being surrounded by hostile numbers, a jury may infer that, at some time in the course of the act, it was not against her will. Of course, the phrase, "the utmost resistance," is a relative one; and the resistance may be more violent and prolonged by one woman than another, or in one set of attending physical circumstances than in another. In one case a woman may be surprised at the onset, and her mouth stopped so that she cannot cry out, or her arms pinioned so that she cannot use them, or her body so pressed about and upon that she cannot struggle. But whatever the circumstances may be, there must be the greatest effort of which she is capable therein, to foil the pursuer and preserve the sanctity of her person. This is the extent of her ability. (And see *The People v. Bransby*, 32 N. Y., 525, 531, 540; *The People v. Hulse*, 3 Hill, 309, 316, 317; *Rex v. Lloyd*, 7 Carr. & P., 318; *Crosswell v. The People*, 13 Mich., 427, 433.)

The request to charge in this case differs from that in *The People v. Monnais*, 17 Abb. Pr., 345, if that case be conceded to be correctly decided, as to which we need not now express an opinion. There the request was, "that the jury cannot convict, unless they are satisfied from the evidence that utmost resistance was used." It is the abstract proposition which is presented there, and might be understood to be the utmost reluctance capable on the part of any one in peril of violation. In this case, it is the extent of the ability of this prosecutrix at that time. To quote exactly the language of the request, that she "resisted the defendant to the extent of *her ability, on the occasion*, it is alleged the defendant committed the offence charged against him."

The words "her ability," and "on the occasion," make measurement of the ability to the extent of which she must be found to have gone. It was the extent of her ability, but not only that, but the extent of her ability on that occasion, that is, amid the circumstances in which she then was placed, to which the request to charge asked that the attention of the jury be directed. It is the law of this crime, in this State, that the woman must have resisted to the extent of her ability on the occasion on which she alleges that this grievous wrong was done her? Is not the law of her conduct in the transaction included in the form of words which the counsel for the prisoner offered to the court? Would it have been error to have so instructed the jury? To our thinking, these first two queries can have but one answer, in the affirmative; and that given, the last query must be replied to in the negative. Can the mind conceive of a woman, in the possession of her faculties and powers, revoltingly unwilling that this deed should be done upon her, who would not resist so hard and so long as she was able? And if a woman, aware that it will be done unless she does resist, does not resist to the extent of her ability on the occasion, must it not be that she is not entirely reluctant? If consent, though not express, enters into her conduct, there is no rape. The yielding to overpowering force is submission, but not consent; if the force be short of that, there may be consent, or the act may not be against her will. We are aware that the view which some other courts have taken of this question does not seem to agree herewith. We have already named *The People v. Monnais* (*supra*), which, however, is somewhat distinguishable from our case. The learned Supreme Court of Massachusetts, in *The Commonwealth v. McDonald* (110 Mass., 405), approved of an instruction to a jury, "that there was no rule of law requiring a jury to be satisfied that the woman, according to their measure of her strength, used all the physical force in opposition, of which she was capable." The case is meagerly reported. There is no discussion of the question, and *Regina v. Camplin* (1 Cox C. C., 220; see *S. C.*, 1 Car. & K., 746) is cited as an authority. What that case was is best shown by the remarks of PATTERSON, J., in pronouncing sentence upon the prisoner:

"The prosecutrix showed by her words and conduct, up to the last moment at which she had sense or power to express her will, that it was against her will that intercourse should take place. And it was by your illegal act alone, that of administering liquor to her, to excite her to consent to your unlawful desires, that she was deprived of the power of continuing to express such want of consent. Your case, therefore, falls within the description of those in which force and violence constitute the crime, but in which fraud is held to supply the want of both." And it must have been in reference to the circumstances thus spoken of that Lord DENMAN, C. J., said, during the argument: "It is put as if resistance was essential to a rape; but that is not so, although proof of resistance may be strong evidence in the case." In Massachusetts, before *McDonald's Case* (*supra*), it was declared the law that carnal intercourse with a woman, who from insensibility was incapable of consenting, was rape. (*Com. v. Burke*, 105 Mass., 376.) And if *McDonald's Case* (*supra*) was in its facts like the case there cited of *Reg. v. Camplin*, it was but a reiteration. These cases, however, are not precisely applicable to that in hand. In this State our statutes make a distinction between a rape, and the act of carnal intercourse without her consent with a woman made insensible by the administration of that which produces stupor; and the latter is an offence against the person, but not rape. (2 R. S., 663, § 23; *The People v. Quinn*, *supra*.) It is yet to be seen, so far as we have discovered, what the court of last resort would hold, where the act was effected by stratagem or fraud, or by insensibility brought about by any other means than those specified in the twenty-third section. (*Supra*. See, however, 1 Wheeler's Cr. Cases, 378, 381, *n.*, *People v. Bartow*.) The revisers say that the offence, under such circumstances, probably would not be rape. (5 Edmonds' Stat., 542.) In Iowa, it is held in one case, that it is not necessary to establish the non-consent or force by the outcry of the female, nor to show the fact of an actual struggle. It is to be observed of that case, that the imbecility of mind of the female was shown, and that some force was used by the accused; and the case turned, I think, upon the lack of intelligence in the victim to give or withhold consent, or to

prompt a vigorous resistance. (*State v. Tarr*, 28 Iowa, 397.) No such case is before us.

It is our judgment, however, as by the law of this State, there can be the crime of rape of a female over ten years of age, only where the act is against her will, that if she is conscious of what is attempted, and has the possession of natural mental and physical powers in usual degree, is not overawed by the number of assailants, nor terrified by threats of death or the like; nor in such place and position as that resistance is useless; she must resist until exhausted or overpowered, for a jury to find that it is against her will.

In this case the prosecutrix may or may not have done all that she could. But it was for the jury, before they convicted, to be satisfied that she had.

For this reason the order of the General Term should be affirmed.

All concur.

Order affirmed.

SUPREME COURT.

First Department—New York, 1874.

MAHONEY v. THE PEOPLE.

The prisoner was tried for robbery in the first degree. The question submitted by the counsel for the prisoner was, did his client commit robbery in the first degree, or was it simply larceny from the person? The *Recorder* charged the jury: "If you believe his statement in reference to the occurrence to be true, I charge you that the force used by the prisoner is that character of violence comprehended by the statute. The statute does not define the character or characters of the force or injury that must be used to constitute one of the elements of robbery in the first degree; it nowhere says that a person shall be knocked down and beaten senseless before the assailant can come within its comprehension; but I charge you, if you believe Mr. Corson's statement to be true, that the prisoner put his arm around his neck and violently and forcibly then and there jerked his head back, in the manner he described that he did, and forcibly and feloniously took from his person his pocket-book and money, that it was a robbery with felonious intent, and accompanied by violence."

Held, that the violence which the words proved, was sufficient to prove the charge. The amount and degree of violence which the accused must exert

to bring him within the statute defining robbery, are not declared, the jury must determine that from the evidence, under the charge of the court, which in this instance was correct.

John O. Mott, for the prisoner.

Benjamin K. Phelps, for the people.

WESTBROOK, J. On the 5th day of April, 1873, upon a somewhat rainy night, about the hour of ten and a half, one Peter R. Corson, who was on his way to his residence at No. 319 East Twentieth street, in the city of New York, from Barnum's Museum, having hold of his boy with one hand, and an umbrella in the other, was immediately, on stepping upon the platform of a Third Avenue car, robbed of his pocket-book and contents by the prisoner.

The questions which the counsel for the plaintiff in error presents are, was the crime committed that of which he was found guilty, to wit: Robbery in the first degree, or was it simply larceny from the person? The prisoner's counsel upon the trial conceded "that his client was guilty of the grand larceny, in having feloniously taken the complainant's property from his possession," but insisted "that it was unaccompanied by violence, within the meaning and comprehension of the statute."

The recorder, after reading to the jury one statute which defines the crime of robbery in the first degree, left to them the question of the truth of the story of the complainant, and then added: "If you believe his statement in reference to the occurrence to be true, I charge you that the force used by the prisoner is that character of violence comprehended by the statute. The statute does not define the character or characters of the force or injury that must be used to constitute one of the elements of robbery in the first degree; it nowhere says that a person shall be knocked down and beaten senseless before the assailant can come within its comprehension; but I charge you, if you believe Mr. Corson's statement to be true, that the prisoner put his arm around his neck and violently and forcibly then and there jerked his head back, in the manner he described that he did, and forcibly and feloniously took from his person his pocket-book and

money, that it was a robbery with felonious intent, and accompanied by violence."

Various exceptions taken by the prisoner's counsel to this charge, presents this question: Conceding the truth of Mr. Corson's evidence, is the prisoner guilty of the crime whereof he stands convicted?

The narration of the occurrence by the complainant is as follows:

"I stept on and made an effort to get into the car; there was a very large man stood right in the front door of the car, holding me back; that man (the prisoner) came and put his arm around my neck; pulled upon me; pulled up my head so [showing], and I had this arm — my left arm — kind of up, and then he pulled me two or three times; said I 'what are you doing?' he said 'I want to get that lady in;' I saw no lady; well, perhaps, in less than one-tenth part of the time I have been stating it, he stepped off; I felt his hand come out of my pocket.

"Q. (By the court): What did he do to your neck, put your head up?

"A. Yes, sir; and pulled back with his left arm.

"Q. (By the assistant district attorney): Where did he stand then, behind you?

"A. He stood rather in front of me; that way [showing]; I stood this way; he stood in front of me, reaching around; the other man stood here, crowding me against the door."

The witness then described the contents of his pocket-book, and said that he felt for and missed it as soon as the prisoner withdrew his hand. On his cross-examination, the witness further testified:

"Q. How did he put his arm around your neck; was he pushing you one side?

"A. No; he was pulling me to him.

"Q. Where was he; in what position in the car; was he next to the driver, or where?

"He was just outside; on the edge like that, you know; I stood right here; he reached in and got his hand around my neck, and pulled me to him; pulling me out; pulling up in the front; up so, you know; I stood here.

"Q. You asked him what he was doing?

"A. Yes sir.

"Q. Did he hurt you ?

"A. He did not hurt me particularly ; he gave me a pretty good jerk."

The foregoing is all the evidence given upon the trial, showing the violence used ; and our statute governing the case is as follows :

"Every person who shall be convicted of feloniously taking the personal property of another from his person, or in his presence, and against his will, by violence to his person, or by putting such person in fear of some immediate injury to his person, shall be adjudged guilty of robbery in the first degree." 2 R. S., p. 697, § 55 (Eds. ed.).

In discussing the point made by the prisoner's counsel, that the recorder erred in instructing the jury that if they believed the truth of the evidence of the complainant, hereinbefore detailed, then the prisoner was guilty of the offence described in the statute just quoted, it is apparent that it is liable to the fatal objection that the error does not affirmatively appear, because the bill of exceptions is so drawn as not to show to this court all the evidence of violence upon which the court and jury acted. It is an elementary principle, that, in the absence of all the evidence given upon the trial, the appellate court will assume, when the question is upon the sufficiency of the evidence, that that which is not returned to it, warranted the ruling, and justified the verdict. Upon the trial of the indictment, not only did the complainant undertake to describe the alleged robbery by words, but by acts ; he exhibiting to the jury, by physical action, the mode and manner thereof. That description which the court and jury by and before which the prisoner was tried, saw, and from seeing which a correct idea of the force and violence used in perpetrating the theft can alone be formed, this court cannot see, and because it cannot, it is unable to say, and cannot say, that the recorder erred in his charge. On the contrary, upon the well-known rule to which we have alluded, that the tribunal whose proceeding is reviewed is presumed to have decided rightly, unless the error affirmatively appears, this court must assume that the representation by action of the force used in the perpetration of the crime, and which it is impossible for us to learn from the bill of exceptions, sufficiently proved to it that the prisoner

used violence enough to bring him within the statute. For this reason alone, the conviction should be affirmed.

But it also seems to us that the violence which the words proved, was sufficient to prove the charge. The amount and degree of violence which the accused must exert to bring him within the statute defining robbery, are not declared, and they manifestly could not be. The gravamen of the crime consists in taking "the personal property of another from his person, or in his presence, and against his will, *by violence to his person*, or by putting such person in fear of some immediate injury to his person." In other words, the violence to the person, or the fear of immediate injury to the person, which, against the owner's will, is sufficient to take his property, will, if the taking be felonious, render the taker amenable to the statute. It is not the extent and degree of force which make the crime, but the success thereof. In short, the force which is sufficient to take the property against the owner's will, is all that the statutes contemplates; the distinction between robbery and larceny consists in this: In the latter, the act "is accomplished secretly, or by surprise or fraud, while in the former the felonious taking must be accompanied by circumstances of violence, threats, or terror to the person despoiled." (East's Pleas of the Crown, 559.)

In the case before us, the accomplice of the prisoner crowds the complainant against the door of the car, whilst the accused throws his arms around the prosecutor's neck, pulls him toward him, and then rifles his pocket. If this statement be true, it amply justified the charge; for, whether the force gave pain or not, it accomplished the theft, and by it, and it alone, Mr. Corson was feloniously deprived of his property, against his will, though conscious of the act and trying to prevent it.

The books contain many cases of convictions of the crime of robbery, where the force employed was evidently no greater than the force in this, with the citation of one very familiar, we end the discussion. In *Commonwealth v. Sneling* (4 Binney, 379), "a special verdict found that the prisoner took the prosecutor by the cravat, with an intention to steal his watch, and also pressed his breast against the prosecutor's, and held him against a wall, during which he

took the prosecutor's watch from his fob without his knowing it, and that the prosecutor had no idea that he meant to rob him ; but was afraid that he meant to whip him. This was held to be robbery." (Cited from 2 Wharton's Criminal Law [7th ed.], § 1701.) The principle which the case just cited determines, is this: That when force is employed to divert the owner's attention, whilst he is unconsciously deprived of his property, the taker is guilty of robbery, though, by means of the force which distracts his attention, the larceny is artfully and unknown to the owner completed.

This is sound sense and good law. The force stratagetically employed so as to deceive an opposing commander as to the real object, whilst the latter is stealthily but successfully pursued, is that which wins the battle, though employed by indirection to accomplish the result. And the force which a thief uses to and upon the person of his victim, to consummate a robbery, if successful, is as much the successful force which robs when excited to bewilder and confuse, as when used and exerted directly upon the main object. In either, the taking would be the result of force, though in one case indirectly applied, and in the other directly.

In the case before us, the most that could be said in favor of the prisoner, is, that his confederate and he used force to distract Mr. Corson's attention whilst his pocket was picked. Unlike the Pennsylvania case, however, the hand which grasped the pocket-book was felt, and the theft discovered. The force, however, was in both cases, to give the most favorable construction to the prisoner of the evidence, used for the same purpose, and if thus employed in the one case it was robbery, it was equally so in the other.

The result of our examination is, that the conviction and judgment in this case must be affirmed.

DAVIS, P. J., concurred.

Judgment and conviction affirmed.

COURT OF APPEALS.

NEW YORK, 1874.

THE PEOPLE v. GENET.

The General Term of the First Department denied a motion for a mandamus to compel the Court of Oyer and Terminer, to settle and seal a proposed bill of exceptions. The bill of exceptions was presented to the court for settlement, but they declined to proceed on the ground that the defendant is still a "fugitive at large, and beyond the control and without the power of the authorities of this State, he having made his escape and absconded from their custody after his conviction, and while awaiting the action of the court upon it."

Held, that an escaped prisoner cannot take any action before the court. The whole theory of criminal proceedings is based upon the idea of the defendant being in the power, and under the control of the court, in his person. The provisions of the statutes, giving to defendants in criminal cases the right to make a bill of exceptions, are not so absolute as to displace all the other principles which belong to criminal proceedings, but must be taken in subordination to them.

W. A. Beach, for the defendant.

Benj. K. Phelps, district attorney, for the people.

JOHNSON, J. The order appealed from denies the defendant's application for a mandamus to compel the sealing of a proposed bill of exceptions relating to the trial of the defendant for a felony, of which he was found guilty by a verdict of the jury.

The sole ground on which the mandamus was denied is, that after the defendant was found guilty, and before sentence, he escaped out of custody and still remains at large. We think it essential to any step, on behalf of a person charged with felony after indictment found, that he should be in custody; either actual, by being confined in jail, or constructive by being let to bail.

The whole theory of criminal proceedings is based upon the idea of the defendant being in the power, and under the control of the Court, in his person. While the Constitution and the statute provide him with counsel, and the statutes give the right of appearance by attorney in

civil cases, they are silent in respect to the representation of persons charged with felony by means of an attorney, and in regard to those charged with lesser offences, the statutes permit them to be tried in their absence from court, only on the appearance of an attorney duly authorized for that purpose. This authority it has been held must be special, and distinctly authorize the proceedings. (*People v. Petry*, 2 Hilt., 525; *People v. Wilkes*, 5 How. Pr., 105.) Even in the absence of statutory regulations this rule has been enforced in the courts of the United States. (*United States v. Mayo*, 1 Curtis' C. C., 433.) In criminal cases there is no equivalent to the technical appearance by attorney of defendant in civil cases, except the being in actual or constructive custody. When a person charged with felony has escaped out of custody, no order or judgment, if any should be made, can be enforced against him; and courts will not give their time to proceedings which, for their effectiveness, must depend upon the consent of the person charged with crime. The fact that, in this State, the law allows proceedings on writs of error without requiring the actual presence of the criminal in court, does not at all conflict with the view that steps will not be allowed to be taken on his behalf, when he is no longer in custody or on bail, but has fled from the custody of the law. His presence in court is necessary when he is to be tried, or when some sentence or judgment involving his corporal punishment is to be pronounced. His being in custody is necessary to any step for or against him, except such as may be taken to bring him again into custody. All the cases which consider the question, seem to concur in the view that an escaped prisoner cannot take any action before the court. (*Commonwealth v. Andrews*, 97 Mass., 545; *Reg. v. Candwell*, 17 Q. B., 503; *Shearman v. Commonwealth*, 14 Gratt., 677; *Leftwich v. The Same*, 20 id., 716; *Anon*, 31 Maine, 592.) In analogy to these cases, while proceedings of outlawry were, under former laws, the consequence of a defendant criminal not appearing in person, he could only have a writ of error to reverse those proceedings on rendering himself into custody and coming in person to the bar to pray that the writ should be allowed to him. (1 Chitty Cr. Law, 369; 1 R. L., 167, § 9.) The provisions of the statutes, giving to defendants

in criminal cases the right to make a bill of exceptions, are not so absolute as to displace all the other principles which belong to criminal proceedings, but must be taken in subordination to them.

We think they do not require the courts to encourage escapes and facilitate the evasion of the justice of the State by extending to escaped convicts the means of reviewing their convictions.

The order should be affirmed.

All concur.

Order affirmed.

SUPREME COURT.

Third Department—New York, 1874.

O'ROURKE v. THE PEOPLE.

The prisoner was indicted and tried, before the General Sessions of Saratoga county, for a violation of the excise law in selling strong and spirituous liquors, wines, ale and beer, in quantities less than five gallons, by retail, without a license, to be drank in his house. The evidence on the part of the prosecution was, that the defendant kept a saloon and sold ale on draught to be drank on the premises.

The defence offered in evidence a license granted to him by the board of commissioners of excise, covering the time laid in the indictment for the commission of the offence. The license authorized the defendant "to sell and dispose of strong and spirituous liquors, wine, ale and beer, in quantities less than five gallons," at his saloon.

The trial court held, that such license afforded no justification or protection to the defendant, and excluded the evidence.

Held, that the license offered in evidence afforded a justification of the sale proved against the defendant on the trial, and its exclusion was erroneous. The license was good to the extent the board had authority to license, and it is plain that it was intended by the board to grant the privilege to the licensee to sell ale and beer. Such intent appears on the face of the license; it grants the right in express terms. It does not follow that if inoperative in part, it is therefore void *in toto*. By the amendment of 1869 full power was conferred upon the board of excise to grant a license to sell ale and beer to be drank in the saloon of the plaintiff in error.

P. H. Cowen, for the prisoner.

E. W. Paige, for the people.

BOCKES, P. J.: The plaintiff in error, O'Rourke, was indicted for unlawfully selling strong and spirituous liquors, wines, ale and beer, in quantities less than five gallons, by retail, to be drank in his house. The proof was that he kept a saloon, and sold ale on draught to be drank on the premises. He was convicted on the indictment, and was sentenced by the court to pay a fine of fifty dollars, and to stand committed until the fine was paid. Thereupon he sued out a writ of error to this court.

By way of justification and defence, the plaintiff in error offered in evidence a license granted to him by the board of commissioners of excise in and for the village in which he conducted his business of saloon keeping, covering the time laid in the indictment for the commission of the offence, to wit: February, 1874; by which license he was authorized "to sell and dispose of strong and spirituous liquors, wine, *ale and beer*, in quantities less than five gallons," at his saloon. The license did not, *in terms*, allow the drinking of the liquors, wine, ale and beer on the premises; nor did it declare that such license should not be deemed to authorize the same "to be drank in the house." (Sec. 11, Act of 1857.) The court held that such license afforded no justification or protection to the defendant, and excluded the evidence. The question is, therefore, whether this ruling was correct in law.

The examination in this case involves the construction of three legislative acts, now constituting the excise system of the State. The first was adopted in 1857 (Sess. Laws 1857, chap. 628); the second, amendatory thereof, passed in 1869 (Sess. Laws 1869, chap. 856); the third (Sess. Laws 1870, chap. 175), after making some general provisions, adopted the act of 1857, in so far as its provisions were not inconsistent nor in conflict therewith. These three acts must be considered as one consolidated act, and all their provisions must be made to harmonize, so far as may be, in order to carry out the purpose the legislature had in view in their enactment.

It may be well, first, to note the provisions of the Law of 1857, before it was amended by the act of 1869. The Law of 1857, as originally passed, provided for two kinds of licenses (section 2), one to be granted to keepers of inns,

taverns or hotels; the other to persons denominated "storekeepers." The former were to be allowed to sell intoxicating drinks in quantities less than five gallons, to be drank on the premises. The latter were to be allowed to sell by small measure also, but not to be drank in the shop, house, out-house, yard, or garden of the licensee. To these two classes of persons, and to none other, could licenses be granted under the original law. Then came the amendatory act of 1869, which in no way affected the subject as to inn, tavern, or hotel keepers, but authorizing the licensing of persons, in the discretion of the commissioners of excise, to sell "*ale or beer*," without, however, making an expression on the subject whether such beverages might or might not be drank on the premises of the licensee. This section reads as follows :

"All the provisions of this act, as amended, shall be held to apply to the sale of ale or beer, except so much thereof as forbids the granting of licenses to any person, except to such persons as propose to keep an inn, tavern or hotel; and the commissioners of excise may, in their discretion, grant license for the sale of ale or beer for a sum not less than ten dollars to other than those who propose to keep an inn, tavern or hotel."

This amendment, as will be observed, provided for the licensing of a third class of persons; and thereafter, there were three classes of persons to whom licenses might be granted, to wit: inn, tavern, or hotel keepers, storekeepers, and such others as might be especially licensed to sell "*ale or beer*." Then came the act of 1870, which restated in general terms to whom licenses might thereafter be granted, and adopted the act of 1857 (as amended of course), wherein were prescribed the qualifications and restrictions attached to the power of the board, as to the granting of licenses; and also as to the right of sale by licensees. The act of 1870 omitted *storekeepers*, under that designation, but authorized the licensing of "any person or persons" of good moral character, who should apply in due form, and be approved of by the board.

We must now recur to the provisions of the act of 1857, in order to determine the restrictions which attached to the authority of the board of excise to license; or, in other

words, what rights of sale the board had the power by law to confer on licensees.

1st. As regards inn, tavern or hotel keepers, there is no question here raised. They might be licensed to sell intoxicating drinks by small measure to be drank on the premises, subject to certain conditions and restrictions particularly specified in the act. (Act of 1857.) But as above stated, no question is here raised affecting the rights of persons licensed to keep inns, taverns and hotels.

2d. So, too, the board of excise could grant license to any person or persons, in their discretion, to sell by small measure, but not to be drank on the premises of the licensee.

The qualifications of this class of licenses are declared in the act of 1870; and fee for license to them should not be less than thirty, nor more than one hundred and fifty dollars. Under such license the licensee would be authorized to sell ale and beer, because within the signification of strong liquors. (*Commissioners v. Taylor*, 21 N. Y., 173.) Besides, ale and beer are specifically designated in the act. The condition or limitation which the law attaches to this class is, that the licensees shall not be allowed to sell, to be drank on the premises. This restriction is imposed by the provisions of the Law of 1857. It is claimed (but as I think, without basis of support), that such restriction does not exist since the passage of the act of 1870; that no such limitation is declared in that act; and that the provisions of restriction contained in the Law of 1857, are in conflict therewith. The question then arises, are the provisions of the Law of 1857, which prohibits the granting of licenses for the sale of intoxicating drinks by small measure, to be drank on the premises, to others than inn, tavern, and hotel keepers, and to persons especially licensed to sell ale and beer only, in conflict or inconsistent with the general provision in the Law of 1870?

Let us consider this subject by bringing the two provisions together. The Law of 1870 provides that the board of excise "shall have power to grant licenses to any person or persons * * * permitting him and them to sell and dispose of, at any one named place * * * strong and spirituous liquors, wines, ale and beer in quantities less than five gallons at a time," etc. This act also provides (section 6), that the provisions of the act of 1857 shall remain in force,

and be taken and continued as part thereof, except so far as the same are inconsistent or in conflict therewith. The act of 1857 declares that licenses shall not be granted to any person to sell strong and spirituous liquors, to be drank on the premises of the person licensed, unless such person proposes to keep an inn, tavern or hotel. (Section 6.) The purport and effect of the amendatory act of 1869, as to ale and beer, will be hereafter separately considered. Now, are these provisions of law, above cited, inconsistent or in conflict, to an extent that both cannot stand and have effect? It has been deemed a wise policy during a long period in the history of our State, to prevent the sale of intoxicating drinks on the premises where sold, except under circumstances of restraint; hence two kinds of licenses were provided for; one of which, while it allowed a sale in quantities less than five gallons, yet did not allow it to be drank on the premises. This was deemed to be, and doubtless was, wholesome in its results; as then no encouragement was given to the congregating of dissipated and idle persons at the place of sale. The result was attained by a special provision in the law qualifying the general provision; and such qualifying general provision was never supposed to be inoperative for repugnancy. The act of 1857, like all, or nearly all, preceding excise laws, recognized this policy. It authorized the licensing of inn, tavern, and hotel keepers, to sell strong and spirituous liquors to be drank on the premises of the licensee (section 2), and it also provided for the licensing of "storekeepers," who were authorized to sell in quantities less than five gallons, but not to be drank in their shops, houses, out-houses, yards or gardens (section 2). Then came the act of 1870, with the provision above cited, which extended the right of license to others beside storekeepers, to wit: "To any person or persons * * * permitting him and them to sell and dispose of, at any one named place * * * strong and spirituous liquors, wines, ale and beer, in quantities less than five gallons at a time." This provision does not abrogate the section of the act of 1857, which declares that licenses shall not be granted to others than inn, tavern and hotel keepers, to sell strong and spirituous liquors to be drank on the premises. These provisions are to be read and con-

strued together. The section of the act of 1857 having been adopted by express terms into the act of 1870, qualifies and limits the provisions of the latter act, in so far as that act gives the right to the board to license persons, other than inn, tavern, and hotel keepers, to sell intoxicating drinks. It is often the case that one section or provision of a law operates as a qualification and restriction of another; then the law remains in force as qualified and restricted. Thus the law of 1857 prohibits the granting of licenses to persons other than inn, tavern or hotel keepers, to sell in small measure to be drank on the premises of the licensee. The act of 1870 adopts this prohibition, and declares it operative. The Law of 1857 authorized the licensing of storekeepers, giving them also permission to sell by small measure; and the Law of 1870 extended this right to *any person*, leaving, however, the general provision in the act of 1857 in force, which prohibited all persons, except inn, tavern and hotel keepers, from selling by small measure to be drank on the premises of the licensees. Thus read together, there is no conflict or inconsistency in these provisions; and thus construed, they harmonize, and effect is given to the evident intent of the legislature. It would seem that the Law of 1870 superseded the provision in the act of 1857, which authorized the licensing of *storekeepers* by that designation: for, by the Law of 1870, permission is given to the board of excise to license *any person or persons* to sell intoxicating drinks by small measure, in its discretion. In this law the right to license is not restricted to storekeepers, but extends to any person in the discretion of the board, and of course would embrace the former. Thus any person may be authorized by license, in the discretion of the board, to sell by small measure; not, however, to be drank on the premises, for, by another provision, none but inn, tavern and hotel keepers could be licensed to do that. This prohibition remains in force unless repealed by implication. A repeal of a law by implication is never allowed, except from necessity; as when the two cannot stand together, the former is deemed to be repealed by the latter. (*Spratt v. Huntington*, 48 How., 97, 101.) Such is not this case. Nor is it reasonable to suppose that such result was intended; for if the restriction be repealed in

this case, all restraint upon the licensing power to be exercised by boards of excise, is abrogated as regards the place where intoxicating drinks authorized by them to be sold, shall be drank; and then, under a license granted in pursuance of section 4, of the act of 1870, the licensee might sell all kinds of intoxicating drinks by small measure, to be drank on his premises, with impunity. Such is not, in my judgment, the condition of the laws of this State. When read and construed as one legislative act, the Law of 1857 and of 1870 are harmonious in this: That inn, tavern and hotel keepers may be licensed to sell intoxicating drinks by small measure, to be drank on the premises; and any person or persons may also be licensed to sell by small measure, not to be drank on the premises. Against the licensing of any person or persons (except innkeepers) to sell intoxicating drinks by small measure to be drank on the premises, there is a general and complete prohibition. It is as follows: "Licenses shall not be granted to any person to sell strong and spirituous liquors and wines to be drank on the premises of the person licensed, unless such person proposes to keep an inn, tavern or hotel." This provision is not repealed by express terms; nor is it abrogated by necessary implication. It therefore stands in full force as the Law of this State. The construction above given harmonizes the various provisions of the Law of 1857 and of 1870; secures wholesome police regulations, and sustains the general moral purpose sought to be attained by a useful and sound system of excise, applicable to the promiscuous sale of intoxicating drinks.

Particular note has not been above taken of the Law of 1869, which will now receive attention.

3d. There is also another class of licensees: persons who may be licensed to sell "*ale or beer*" under the Law of 1869, amendatory of the act of 1857. For license to sell such beverage only, the fee is in the discretion of the board, not however to be less than ten dollars. Can this class of licensees sell such beverages by small measure to be drank on the premises? The law does not give this right in express terms, but I am inclined to the opinion that it gives such right by fair, if not by necessary implication. The law reads as follows: "All of the provisions of this act,

as amended, shall be held to apply to the sale of ale or beer, except as much thereof as forbids the granting of license to any person, except to such persons as propose to keep an inn, tavern or hotel; and the commissioners of excise may, in their discretion, grant license for the sale of ale or beer for a sum not less than ten dollars to other than those who propose to keep an inn, tavern or hotel." Now this law qualifies every section of the act of 1857, which, by express terms or by implication, forbids the granting of licenses to persons to sell ale or beer. Therefore, in every such section, there must be understood to be an exception, which will give this amendatory law due effect. Let us then insert such exception accordingly, and see then what the law is, as applicable to the power of the board of excise to grant licenses to sell ale and beer.

The first section which bears on this subject, in the act of 1857, is section 6. Insert the necessary exception, and this section will read as follows: "Licenses shall not be granted to any person to sell strong and spirituous liquors and wines, *except ale or beer*, to be drank on the premises of the persons licensed," etc.; and close the section with an express power to grant licenses to sell ale or beer to any person, in the discretion of the board. (See last clause of section 4 of act of 1866.) The next section requiring an exception, is section 11. With the exception inserted, it will read as follows: "In all licenses that may be granted to sell strong or spirituous liquors or wines, in quantities less than five gallons (except to inn, tavern or hotel keepers, and except also to persons to sell ale or beer), there shall be inserted an express declaration that such license shall not be deemed to authorize the sale of any strong or spirituous liquors or wine, to be drank in the house or shop of the person receiving such license, or in any out-house, yard or garden appertaining thereto, or connected therewith."

With the proper exceptions inserted in the next section requiring it, being section 14, it will read thus: "Whoever shall sell any strong or spirituous liquors or wines, *except ale or beer*, to be drank in his house or shop, * * * without having obtained a license therefor as an inn, tavern or hotel keeper, shall forfeit fifty dollars for each offence."

Apply the amendatory law of 1869 to these three sections

of the act of 1857, in manner above stated, by inserting the proper exceptions therein to give the former law effect, and there will remain no provision forbidding the granting of licenses by the board of excise to any person in their discretion, to sell ale or beer to be drank on the premises of the licensee, nor any provision forbidding or making penal the selling of those beverages by the person licensed, to be drank on the premises specified in his license.

Then why need any one take license at all to sell ale or beer? The answer is, that there is still a provision of law which renders the selling thereof without license, penal. Section 13 declares that "whoever shall sell any strong or spirituous liquors" [which terms embrace ale and beer] "or wines, in quantities less than five gallons at a time without having a license therefor, *granted as herein provided*, shall forfeit fifty dollars for each offence." This provision applies to the amendatory law of 1869, which, while it removes all restriction upon the authority of the board of excise to grant licenses to any person in their discretion, to sell ale and beer in small quantities to be drank on the premises of the person licensed or elsewhere, yet, provides for the granting of a license to sell such beverage, and adopts the Law of 1857, which renders it penal to sell it without license. Therefore, no person without license can sell ale or beer, in quantities less than five gallons, with impunity. But having license to sell such beverage, as authorized to be granted by the amendatory law of 1869, the licensee may sell it without any restriction as to the place where it is to be drank.

If the conclusions above declared be sound, there are, under the provisions of the excise laws of this State now in force, three classes of persons who may be licensed by the board of excise to sell intoxicating drinks, to wit: Inn, tavern and hotel keepers, who may, under proper license, sell in quantities less than five gallons, to be drank on the premises; (2), persons who may sell by small measure, not to be drank on the premises; and (3), persons who may sell "ale or beer" only, without restriction as to the place where the same may be drank.

In the case at bar, no justification was offered for the sale proved against the plaintiff in error under an innkeeper's

license. He was not an innkeeper, nor did he attempt to justify the sale as such. Nor did his license, offered in evidence, afford him protection for the sale of strong and spirituous liquors (except ale and beer) to be drank either on or off his premises. It could not justify a sale by him (except of ale or beer) in quantities less than five gallons, to be drank on his premises, for the board of excise had no authority to grant such license to any others than to inn, tavern and hotel keepers, and to persons to sell ale and beer under the provisions of the act of 1869. And it did not justify a sale by him (except of ale and beer) by small measure to be drank elsewhere, because it did not contain the clause required to be inserted by section 11 of the act of 1857, without which the license would, in case of sale, be amenable to section 13 of that act; which last mentioned section declares a penalty against persons who sell without license granted as in that act provided. The license offered in evidence was of no force or effect whatever, except as to ale and beer. The question then is, whether it was effectual to protect the licensee for the sale of ale and beer on draught. If so, there being by law no restriction as to the place where it might be drank, the sale proved against the plaintiff in error was justified by it. The Law of 1870 authorized an application for, and the granting of, a license to sell "ale and beer." Section 4 of the Law of 1869, fixed the terms. In this case the licensee applied for greater privileges, to wit: the right to sell generally, strong and spirituous liquors and wines, as well as ale and beer; and it seems the board of excise attempted to confer those greater rights. In this there was a failure. But I am unable to perceive any good reason why the license was not good to the extent the board had authority to license. It is plain that it was intended by the board to grant the privilege to the licensee to sell ale and beer. Such intent appears on the face of the license. It grants the right in express terms. Strike therefrom all that is valueless in law, and the license is complete as a license to sell ale and beer. It does not follow that if inoperative in part, it is therefore void *in toto*. The board of excise intended to grant, and did in fact grant, the right to the licensee to sell ale and beer at his saloon. This the board might do by law. Whatever else was desired, or was attempted to be done beyond the

power of the board to do, and in no way affecting what it might do, would not vitiate and render void that which was done by lawful authority.

The granting of the license was a judicial act. The judgment and discretion of the board was exercised with a view to meet the requirements of law applicable to the granting of a license to sell ale and beer. So the board adjudged in favor of the application under the provisions of the law; and, according to its requirements, determined the character of the applicant, the fitness of the proposed place of sale, and the amount to be paid for the license. I can perceive no reason why a license may not be so framed as to combine the right to a license, other than an innkeeper, to sell strong and spirituous liquors and wines by small measure, with the special right to sell ale and beer. If all the conditions and requirements of the law be satisfied, the applicant may, I think, be allowed to sell strong and spirituous liquors and wines to be drank off his premises, and ale and beer to be drank thereon. Both privileges may be granted to the same person, to be exercised at one and the same place.

If so, why may not the board, observing all requisite formalities, combine both in one license? I can see no good reason why this may not be done. This subject of inquiry is not, however, of any importance in this case. The questions here are, whether the board of excise had authority in law to grant licenses to persons other than inn, tavern and hotel keepers, to sell *ale and beer*, in quantities less than five gallons to be drank on the premises; and if so, then whether the plaintiff in error in this case held such license at the time of the sale of ale proved against him. These questions must be answered in the affirmative. The license offered in evidence afforded a justification of the sale proved against the plaintiff in error, and its exclusion on the trial was erroneous.

There is no force in the suggestion that the statute does not, in express terms, declare the unauthorized sale of intoxicating drinks a misdemeanor, or declare it punishable as such. It is sufficient that the act charged in the indictment, is declared by law to be an offence, and is made penal. This subject is not open to discussion, having been elaborately considered and definitely settled by the Court of Appeals.

(*Behan v. The People*, 17 N. Y., 516; *Hill v. The People*, 20 id., 363; *Footte v. The People*, manuscript opinion by FOLGER, J.) But the conclusions above stated, require that a new trial be granted.

COUNTRYMAN, J.: The important question in the case arises on the ruling of the court, rejecting the license offered in evidence, granting to the plaintiff leave "to sell and dispose of * * * ale and beer, in quantities less than five gallons, at his saloon." The only sale proved on the trial to sustain the conviction, was of ale at the plaintiff's saloon, which had been drank on his premises. The court held that no power existed to grant a license giving the plaintiff the right to sell ale and beer to be drank at his saloon, and that the license in question afforded him no protection. The precise point is therefore presented, whether the board of excise had power, under the various statutes now in force regulating the sale of intoxicating liquors, to grant license to a saloon keeper to sell ale and beer to be drank on his premises.

The act of 1857 (Laws of 1857, ch. 628,) gave the "power to grant licenses to keepers of inns, taverns and hotels * * to sell strong and spirituous liquors and wines to be drank in their houses, respectively; and to storekeepers * * * a license to sell such liquors and wines in quantities less than five gallons, but not to be drank in their shops," etc. (Sec. 2.) It then prohibited granting a license "to any person to sell strong and spirituous liquors and wines to be drank on the premises of the person licensed, unless such person proposed to keep an inn, tavern or hotel." (Sec. 6.) It also requires that "in all licenses granted (excepting to inn, tavern or hotel keepers) to sell strong or spirituous liquors or wines, in quantities less than five gallons, there shall be inserted an express declaration that such license shall not be deemed to authorize the sale of any strong or spirituous liquor or wine, to be drank in the house or shop of the person receiving such license." (Sec. 11.) It further provided that "such licenses" [to others than hotel keepers] "shall not be granted * * * until such applicant shall have executed a bond * * * with sufficient sureties * * * conditioned that he will not sell, or suffer to be sold, any strong or spirituous liquors or wines to be drank

in his shop or house * * * and will not suffer" the same to be drank there. (Sec. 12.)

By another provision, it was declared that whoever should sell any strong or spirituous liquors or wines to be drank in his house or shop, or should suffer or permit the same to be drank there without having obtained a license therefor as an inn, tavern or hotel keeper, should forfeit fifty dollars for each offence. (Sec. 14.) It was subsequently determined in the Court of Appeals, that ale and beer were included in the terms "strong and spirituous liquors," as used in these provisions, and therefore came within the prohibition of the statute. (*Commissioners of Excise v. Taylor*, 21 N. Y., 173.) And it was also judicially settled by the same high authority, that a wilful violation of any of these provisions constituted a criminal offence, for which the party may be indicted, convicted and punished. (*Behan v. The People*, 17 N. Y., 520; *Morris v. The People*, 2 Thomp. & Cook, 219.) It is very clear that under these provisions, no valid license could have been granted to the defendant to sell ale or beer to be drank in his saloon, and his conviction, before the amendment of the statute, would have been unexceptionable.

It will be observed that under the act of 1857, there was full power to grant licenses to hotel keepers to sell strong and spirituous liquors, including ale and beer, to be drank on their premises, and full power to grant licenses to all other persons (possessing, of course, the statutory qualifications) to sell liquors, including ale and beer, by the measure, in quantities less than five gallons, with the simple condition annexed, that the liquors could not be drank at the place of sale. The hotel keepers accordingly secured the monopoly of selling liquor, including ale and beer, as a beverage. This condition of affairs caused loud complaints on the part of the keepers of saloons and boarding houses, who made repeated efforts to induce the legislature to grant them the same privileges held by the keepers of hotels. The act of 1869 (Laws of 1869, chapter 856) was finally passed in answer to these complaints, and petitions, and was manifestly intended to enlarge the rights of the petitioners. It amended the act of 1857 in several particulars not material to our present purpose, and then specially pro-

vided as follows: "All the provisions of this act, as amended, shall be held to apply to the sale of ale or beer, except as much thereof as *forbids* the granting of license to any person, except to such persons as propose to keep an inn, tavern or hotel; and the commissioners of excise may, in their discretion, grant license for the sale of ale or beer * * * to others than those who propose to keep an inn, tavern or hotel." (Section 4.) Notwithstanding the language of the first clause in the sentence, taken alone, may seem to fail in giving full expression to the idea meant to be conveyed, the attention of the legislature is quite apparent when the entire section is read in connection with the various provisions to which it relates in the act of 1857. As the statutes are in *pari materia*, it is the duty of the court, in order to ascertain their meaning, to read and construe them together as one act. Thus read, there is no need of interpretation; the provisions are clear and consistent, and the sense is manifest. If we incorporate the two acts together, and read the original statute as amended, it will be as follows: "License should not be granted to any person to sell strong and spiritous liquors and wines (except ale and beer), to be drank on the premises of the person licensed, unless such person proposes to keep an inn, tavern or hotel; (and the commissioners of excise may, in their discretion, grant license for the sale of ale or beer * * * to others than those who propose to keep an inn, tavern or hotel"). But if the act of 1869 be regarded as equivocal or ambiguous, it is incumbent on the court, in searching for its proper interpretation, to refer to the state of the law upon the matter involved prior to its enactment, to consider the purpose or object had in view in its adoption; and, if possible, to give it some some practical effect. "The interpretation which renders a statute inoperative cannot be admitted; it is an absurdity to suppose that after it is reduced to terms it means nothing." (Potter's Dwarries on Statutes, 128.) This, however, is the necessary result of the construction adopted in the court below. As before remarked, the board of excise had full power under the act of 1857 to grant licenses to all persons, in their discretion, to sell liquors, including ale and beer, for any other purpose than to be drank on their premises; and unless the amend-

ment of 1869 gave the right to sell ale and beer to be drank on the premises of the vendor, the sole object of the provision is frustrated, and the entire section a nullity.

It is urged, however, that the amendment does not in terms confer the power to grant a license to sell ale and beer to others than hotel keepers, to be drank on their premises, and under sections 11, 12 and 14, of the original act, no such license could be granted; and it is insisted that the letter of the new act may therefore be obeyed by granting license to sell ale and beer by the measure, and not as a beverage. Aside from the objections already noticed, that this construction would render the amendment wholly inoperative, it is a perfect answer that no affirmative leave or assertion of the right to sell by the drink, either in the statute or the license, was necessary. Prior to the act of 1869, a license to any other person than a hotel keeper, to sell ale and beer to be drank on the premises, would have been void, because section 2 of the statute, in terms, limited the power to grant a license to such person to sell, "in quantities less than five gallons, but not to be drank in the house or shop" of the licensee; and section 6 also expressly prohibited the granting such a license, "unless the person proposed to keep a hotel." It was necessary in order to keep the liquor from being drank on the premises of the vender after the sale, to limit in terms the rights of the parties by an affirmative declaration to that effect. But in the absence of any limitation or prohibition, a mere license to sell confers the right to drink or use the liquor on the premises, or at any place where the parties have a right to be. When, therefore, the amendment of 1869 removed the prohibition in regard to the sale of ale and beer, a mere license to sell those liquors *ipso facto* carried the right to allow it to be drank or used on the premises, in any manner agreeable to the parties in interest.

But power was given by the amendment to grant a license which conferred on the licensee the right to sell ale and beer to be drank on his premises. This was the obvious intention of the act, as the entire section is devoted to the removal of the old prohibition against granting licenses to sell ale and beer to others than hotel keepers to be drank on their premises, and to the express affirmation of the power

to issue such licenses, in the discretion of the board, to all other persons.

It excepts in terms from any application to the sale of ale and beer as a beverage so much of the prohibition contained in section 6, of the original statute, as forbids the granting a license to any person but the keeper of a hotel, and explicitly confers the identical power which had previously been prohibited, to wit: the right to grant such a license to all other persons. The prohibition removed the power conferred to grant such a license, and a license issued in pursuance of the power, the conclusion is obvious that the sale could no longer constitute a criminal offence.

There is no difficulty in adjusting any apparent incongruity between sections 11, 12 and 14 of the act of 1857, and the amendment of 1869, as the special license to sell ale and beer given in the latter act, must be regarded as an additional exception to the provisions of the former. But if the two statutes were inconsistent and irreconcilable, the former would yield to the latter as the latest expression of the legislature; and all portions of the original statute which were repugnant to the new act, would be regarded as repealed. It follows that full power was conferred by the amendment of 1869 upon the board of excise to grant the plaintiff a license to sell ale and beer to be drank in his saloon, and that the license offered in evidence on its face was valid, and a legal defence to the indictment. It is hardly necessary to add that the license would have afforded no protection to the plaintiff for the sale of any other liquors than ale or beer to be drank on his premises. Indeed, prior to 1870, it would have been necessary to have obtained a special license to sell ale and beer, to have secured protection under the amendment of 1869, but since the act of 1870, the leave to sell ale and beer to be drank on the premises, may be included in the general license. (Laws of 1870, chap. 175.) There is no force in the objection that the license was unauthorized because there was no petition of freeholders, or compliance with the other requirements of section 6 of the act of 1857, in relation to hotel licenses, as they have no application to licenses of this character, although those provisions are doubtless still in force, and must be observed in all cases where the applicant for a license "proposes to keep an inn, tavern

or hotel." It does not appear whether the plaintiff complied with all the provisions of the statute applicable to this case, and no question of this kind was raised on the trial. The evidence was rejected, and the case decided, on the broad ground that the license, on its face, was invalid and conferred no right on the plaintiff to sell ale and beer to be drank in his saloon. As this ruling was erroneous, the conviction and judgment must be reversed, and a new trial granted.

Present—BOCKES, P. J., LANDON and COUNTRYMAN, JJ.

Judgment and conviction reversed, and new trial granted.

COURT OF APPEALS.

NEW YORK, 1875.

GARDNER ET AL. v. THE PEOPLE

The plaintiffs in error were convicted of a misdemeanor.

The indictment charged and the proof was that the plaintiffs in error, were commissioners of police and unlawfully removed one Sheridan, an inspector of election, from his office when he was not actually on duty on a day of registration, revision of registration or election, without first giving him notice in writing, setting forth the reasons for such removal as required by the act of 1872, chapter 675, § 13.

On the trial the accused offered to prove that Sheridan had been guilty of improper conduct as an election officer, and on the day of his removal threatened that he would stuff ballot-boxes, which facts were communicated by way of affidavits to the commissioners before removal, and that they believing the charges acted under them in good faith, and under belief and legal advice that the cause of removal brought the case under one of the statutory exceptions excusing notice.

This evidence was excluded as irrelevant and immaterial.

Held, that the statute requires notice to be given as a rule; the exception relates to a particular time, and particular cause. Both must exist to justify removal without notice. The time must be on a day of registration, revision of registration or election, and the cause must be improper conduct as an election officer, and in addition the incumbent must be on duty. Unless these facts all exist, notice is indispensable to a removal.

Held, further, that the manifest construction of the statute is as if it read "The

inspectors of election shall hold office for one year, unless sooner removed for the want of the requisite qualifications, or for cause, in either which cases such removal shall only be made after notice in writing to the officer to be removed, unless made while the inspector is actually on duty on a day of registration, revision of registration, or election, and for improper conduct as an election officer.

The offer of the accused to prove, that they believed the charges made were true, and that they acted in good faith and under legal advice that they had a right to remove for cause without notice was ruled out by the court, and it held that intentionally doing the act prohibited constituted the offence.

Held, that the accused made a mistake of law. Such mistakes do not excuse the commission of prohibited acts. The rule is, that in acts *mala in se*, the intent governs, but in those *mala prohibita*, the only inquiry is, has the law been violated? The act prohibited must be intentionally done. A mistake as to the fact of doing the act will excuse the party, but if the act is intentionally done, the statute declares it a misdemeanor, irrespective of the motive or intent. To sustain an indictment for doing a prohibited act, it is sufficient to prove that the act was knowingly and intentionally done.

It is claimed that the Court of Oyer and Terminer had no jurisdiction to try the indictment under chapter 337 of the Laws of 1855.

Held, that there is nothing in the statute showing an intention to deprive the Oyer and Terminer, from hearing and determining misdemeanors by indictment and trial in the usual way.

A. Oakey Hall, for the plaintiffs in error.

Charles S. Fairchild, for the defendants in error.

CHURCH, Ch. J. The first question that naturally arises is, whether the statute was violated in not giving notice to inspector Sheridan before removing him. The statute is as follows:

"The inspectors of election appointed under the provisions of this act shall hold office for one year unless sooner removed for want of the requisite qualifications or for cause, in either of which case such removal, unless made while the inspector is actually on duty on a day of registration, revision of registration or election, and for improper conduct as an election officer, shall only be made after notice in writing to the officer sought to be removed, which notice shall set forth clearly and distinctly the reason for his removal." (Laws of 1872, chap. 675, § 13.)

Sheridan was removed without notice, and not on a day of registration, revision of registration or election, but it is claimed that he was removed for improper conduct as an elec-

tion officer, and that no notice was necessary. The statute requires notice to be given as a rule; the exception relates to a particular time, and a particular cause. Both must exist to justify removal without notice. The time must be on a day of registration, revision of registration or election, and the cause must be improper conduct as an election officer, and in addition the incumbent must be on duty. Unless these facts all exist, notice is indispensable to a removal. The construction contended for would authorize a removal on the specified days for any cause, and on any other day for improper conduct as an election officer, without notice. This would make the exception broader than the rule. If the word "and" had been "or" there would have been much more force in the position. Then it might be claimed that the power of removal on specified days was unrestricted, and might therefore be exercised for any cause, and that the additional clause, furnished another exception, but as it reads, the words "and for improper conduct as an election officer," are words of limitation, operating to restrict the preceding general language. A slight transposition of the statute will render its meaning more manifest:

"The inspectors of election * * * shall hold office for one year, unless sooner removed for the want of the requisite qualifications, or for cause, in either of which cases such removal shall only be made after notice in writing to the officer sought to be removed * * * unless made while the inspector is actually on duty on a day of registration, revision of registration, or election, and for improper conduct as an election officer."

It is difficult to place any other construction upon the language than that indicated by this rendering, which requires the concurrence of time and particular offence to warrant a removal without notice, and such was doubtless the intention. The exception was evidently designed to protect the purity of the ballot box and the rights of the voters, in an emergency which required prompt action. If the incumbent, while engaged in registering, was found inserting fictitious names, or neglecting the requirements of law, or on election day in stuffing the boxes, or other improper conduct, it was intended that the power of removal might be instantly exercised as a necessity to prevent the continuance

of fraud, while no such necessity would exist upon a day when the incumbent was off duty, or for not being "able to read, write and speak the English language understandingly," or the want of some other qualification. It was to arrest the fraud while being committed, by a prompt removal and a new appointment, that the exception was intended to provide for. Besides the term of one year would be utterly valueless upon the construction contended for. Practically the inspectors would hold merely during the pleasure of the police commissioners, while the legislature evidently designed to give them a fixed term of office to be terminated only in the manner referred to.

The trial proceeded and the conviction was had under a general provision of the Revised Statutes, as follows:

"When the performance of an act is prohibited by any statute, and no penalty for the violation of such statute is imposed, either in the same action containing such prohibition or in any other section or statute, the doing such act shall be deemed a misdemeanor." (2 R. S., 719 [Edm. ed.], § 39.)

The point was presented, whether the statute first quoted contained such a prohibition as constituted a misdemeanor under the section. The prohibition is not in express terms, but I am inclined to think that it is necessarily implied. The provision that removals shall only be made with notice, may be regarded as equivalent to a mandate that they shall not be made without. What is necessarily implied in a statute, is expressed. So it is sufficient that the act is forbidden, unless certain other acts are first done, or certain facts exist, if it appear that the other acts were not done, or the facts did not exist. The plaintiffs in error were prohibited from removing an inspector except on notice. A removal, therefore, without notice, is as much a violation of the statute, as if no removal was permitted. (3 Pat. C. R., 143.)

It was uncontroverted on the trial, that the inspector was not removed on a day of registration, revision of registration, or election, nor that he was removed without notice, but the defendants offered to prove, in substance, that they had been informed, by affidavit, and otherwise, that Sheridan had been guilty of improper conduct as an election

officer, and had, on the day of his removal, threatened that he would stuff the ballot-boxes the next day whenever opportunity occurred; that they believed the charges made were true, and that they acted in good faith and under legal advice that they had a right to remove for such a cause without giving notice. In short, the defence was an honest misconstruction of the law under legal advice. The court ruled out the evidence offered, and held that intentionally doing the act prohibited constituted the offence. It is quite clear that the facts offered to be shown, if true, would relieve the defendants from the imputation of a corrupt intent, and, indeed, from any intent to violate the statute. The defendants made a mistake of law. Such mistakes do not excuse the commission of prohibited acts. "The rule on the subject appears to be, that in acts *mala in se*, the intent governs, but in those *mala prohibita*, the only inquiry is, has the law been violated." (3 Den., 403.) The act prohibited must be intentionally done. A mistake as to the fact of doing the act will excuse the party, but if the act is intentionally done, the statute declares it a misdemeanor, irrespective of the motive or intent. The distinction between a mistake of law and fact is illustrated in 1 Bishop on Crim. Law (§§ 374 to 377). In *The People v. Brooks* (1 Den., 457), the defendant was indicted for a wilful neglect of official duty, in refusing to take an affidavit, and it was held that it was no defence that the officer believed that he was not bound to do the act, and was not guilty of bad faith in refusing. It was also held that "wilful" in the statute meant simply intentional, and that was a much stronger case than this. There is authority for holding that the word "wilfully" may mean corruptly or maliciously. (1 Bish. on Crim. Law, § 421.) In this statute the word is not employed, and hence there is no necessity of defining it. The authorities seem to establish that to sustain an indictment for doing a prohibited act, it is sufficient to prove that the act was knowingly and intentionally done. (See cases before cited; 54 Barb., 318; 4 T. R., 451.) The evidence offered did not tend to show the contrary, but only that the defendants were of opinion that the statute did not require notice to be given before removal. This opinion, if enter-

tained in good faith, mitigated the character of the act, but was not a defence.

The learned counsel for the plaintiffs in error submitted an able and eloquent argument against a conviction for crime where the intent to violate the law is wanting ; but, while agreeing with his general views on the subject of the ingredients necessary to establish crime, we think that the terms of the statute, and the distinction between mistakes of law and fact, render these views inapplicable to the present case. In the cases ingeniously put by the counsel, a defence would be established because the acts would not be intentionally or designedly done. In this case, if the defendants could have shown that they believed that in fact notice had been given to the inspector, although it had not, they would not have been guilty of the offence, because the intention to do the act would have been wanting. Their plea is : True, we intended to remove the-inspector without notice, but we thought the law permitted it. This was a mistake of law, and is not strictly a defence. The case cited from 5th Nevada, 378, tends to support the views of the plaintiff in error, but it is evident that a majority of the court struggled to relieve the defendant from a harsh punishment for a comparatively innocent act. The remarks in the note of a case in 1st East, 563, simply define the distinction between a liability for a judicial and a ministerial act. The doctrine applicable to a case arising under the statute in question is too well settled in this State to justify the court in disturbing it, and, besides, we think it is right. If the offence is merely technical, the punishment can be made correspondingly nominal ; while a rule requiring proof of a criminal intent to violate the statute, independent of an intent to do the act which the statute declares shall constitute the offence, would, in many cases, prevent the restraining influence which the statute was designed to secure.

A doubt has been suggested whether the general statute referred to is applicable for the reason that other statutes, viz., for a wilful neglect of official duty and for corrupt conduct as an election officer under the general statutes, were intended to embrace all cases of misconduct of the character charged ; but this point was not urged upon the trial nor in this court, and it is unnecessary to consider it.

It is claimed that the Court of Oyer and Terminer had no jurisdiction to try the indictment, and this is predicated upon section 5 of chapter 337 of the Laws of 1855, which declares that the Court of Special Sessions shall have power to hear, determine and punish, according to law, all complaints for misdemeanors, and shall possess "exclusive jurisdiction thereof" unless said court orders the complaint into the General Sessions, or unless the accused, when arrested, shall elect to be tried in the Court of General Sessions. We do not think this statute was designed to take away the jurisdiction of the General Sessions which is declared, in the first section of the same act, to be "to hear, determine and punish, according to law, all crimes and misdemeanors whatsoever." The counsel for the plaintiff in error argues that the words, "according to law" limits the jurisdiction to cases ordered into the court under the fifth section. These words relate not to jurisdiction or power, but to the manner of exercising it. It cannot be supposed that the legislature in one section of a statute conferred power upon the General Sessions to hear all misdemeanors, and in another section gave the Special Sessions exclusive power to hear all of them, except such as the latter court might send to the former. Such incongruous provisions would not be likely to be found in the same statute. We should expect the use of quite different terms, but the language of the two sections is materially unlike. The General Sessions may hear, etc., all *misdemeanors*, the Special Sessions have exclusive power to hear all *complaints for misdemeanors*. *Complaints* are preliminary charges before committing magistrates; and it is such complaints when properly before them, that the Special Sessions have exclusive jurisdiction to hear. If the party brought before a committing magistrate elect to have his case heard by the General Sessions, it must go there, and the Special Sessions itself may send cases to the General Sessions. All other complaints they have exclusive jurisdiction to try, that is, all other complaints before them. At the time this act was passed there were cases where an appeal was allowed, after conviction, from the Special to the General Sessions, and upon such appeal the conviction was void. (2 R. S. [Edm. ed.], 740, § 27.) The word exclusive may have been used to meet that

provision ; but whether so or not there is nothing in the statute showing an intention to deprive the General Sessions, much less the Oyer and Terminer, from hearing and determining misdemeanors by indictment and trial in the usual way. Jurisdiction is never deemed taken away by implication ; and if the word exclusive is capable of any other interpretation it must be given, and that it is so is manifest.

The judgment must be affirmed.

All concur.

Judgment affirmed.

COURT OF APPEALS.

NEW YORK, 1874.

THE PEOPLE V. QUIGG.

This was an appeal from an order of the General Term of the Supreme Court, affirming an order of Special Term, which denied a motion of defendant, to vacate a judgment entered on a forfeited criminal recognizance. The judgment was perfected under chapter 315, of the Laws of 1844. The record consisted of the recognizance and certified copy of the order forfeiting the same.

The defendant urges as a ground for vacating the judgment, that the summary method of perfecting such a judgment upon forfeited recognizances, authorized by the laws of 1844 and 1861, is in direct contravention of the fundamental doctrine embodied in the State Constitution, that "no person shall be deprived of life, liberty or property, without due process of law."

Held, that the defendant is not in a situation to take this objection. By the recognizance the defendant acknowledged an indebtedness, subject to a defeasance, and consented that upon failure to perform the condition, the debt should become absolute, and judgment perfected thereon, and that execution might issue as upon other judgments for the recovery of a sum certain. The cognizors waived their right to any day in court other than that given them by the terms of the recognizance, and that day was had accordingly.

The defendant further says that the judgment was taken in disregard of the constitutional provision, preserving inviolate the trial by jury in all cases in which it has been heretofore used.

Held, that the right to a trial by jury, was waived by the terms of the recognizance and assent of the cognizors, and in all civil proceedings the right of a trial by jury may be waived. But the proceedings for judgments were not suits at common law, but a special statutory proceeding, summary in its

character and unknown to the common law, and therefore not within the provision of the Constitution invoked by the defendants.

Held, that, repeal of statutes by implication is not favored and only takes place when two acts are so inconsistent that both cannot stand, and then the later act prevails. Laws, special and local in their application, are not deemed repealed by general legislation, except upon the clearest manifestation of an intent by the legislature to effect such repeal, and ordinarily an express repeal by some intelligible reference to the special act is necessary to accomplish that end.

J. C. Shaw and *W. A. Beach*, for the appellants.

Benj. K. Phelps, district attorney, for the people, respondents.

ALLEN, J. The enactment under which the judgments, from which the defendants seek to be released were perfected, makes a part of an act entitled "An act for the establishment and regulation of the police of the city of New York." (Laws of 1844, chap. 315.) The principal provisions of the law are strictly within its purpose, as expressed by its title, and relate only to the organization of the police force of the city, its officers, and their appointment, removal, compensation and general duties. But slight reference is made in the act to police magistrates, or other judicial officers, and there is nothing in the act itself connecting the section under which the proceedings under review were had, with the duties of any particular class of judicial officers, or courts of criminal jurisdiction. The provision makes a part of article 4 of the law which is entitled "compensation of officers," and the provision stands by itself, and is independent of every other provision of the statute. (Laws of 1844, *supra*, art. 4, § 8.) The language is general and sufficiently comprehensive to embrace all recognizances taken by any magistrate or court for the appearance of persons to answer to criminal charges. The language is: "All cognizances given to answer to a charge preferred, or for good behavior, or to appear and testify in all cases cognizable before courts of criminal jurisdiction, on being forfeited shall be filed," &c. A charge or complaint may be preferred by individuals before a magistrate upon which arrests may be made, and recognizance taken, for the appearance of the accused, or it may be preferred by the presentment

of a grand jury in the form of an indictment. An indictment is merely a written accusation of one or more persons of a crime of a public nature, preferred by and presented upon oath by a grand jury. (Wharton's Law Dic.) It is an accusation by a grand jury to a court having jurisdiction to take proceedings for the arrest and punishment of the offender. The language of the act is technically as applicable to recognizances taken after indictment as before, and there is nothing in the terms employed, or in the connection of the provision with other parts of the act, or in the act itself, to restrict its operation to recognizances taken by committing magistrates, or before indictment, as is urged by the appellants. The act has for thirty years received and had a practical interpretation in accordance with these views, and it would seriously affect the administration of criminal law in the city of New York to give it a different and more restricted interpretation at this late day, even if there might have been reason for some doubt at the first, as to the true meaning and intent of the legislature. But we see no reason to doubt that the practical construction was warranted by the language used.

The notice required by chapter 302 of the Laws of 1846, from the sheriff to the chief of police, and by him to the Court of Sessions and the Police Courts, of the result of attempts to collect judgments upon recognizances by execution, and the cause of a failure to collect, was for a purpose entirely foreign to the character of the recognizances, or the court in which or magistrate by whom they were taken, and therefore does not aid in the interpretation of the act under consideration. The object of the notice was to protect the courts and magistrates named from imposition by fraudulent or irresponsible sureties; and no notice was necessary to courts of record for the reason that the district attorney would have knowledge of the facts in virtue of his office, and would not be liable to imposition as would the police magistrate and the courts named.

The act of 1844 and chapter 343 of the Laws of 1839 have no connection with each other, except as they both deal with the same general subject. They have respect to different remedies, in part, and that given by the later act is cumulative and does not interfere with those regulated or pre-

scribed by the earlier statute, and they are independent of each other and both are valid. (*Almy v. Harris*, 5 J. R., 175; *Welmores v. Tracy*, 14 Wend., 255.) No help in the construction of either act is derived by a reference to the other.

It is claimed that part of the act of 1844, in pursuance of which these judgments were perfected, was repealed by chap. 202 of the Laws of 1855, extending the provisions of the Code of Procedure to forfeited cognizances and repealing all laws in conflict with the same. If this provision is effective for any purpose it only subjects actions upon recognizances, when brought, to the provisions of the Code. It does not, in terms, require actions to be brought in all cases, or repeal the act authorizing summary judgments in the city of New York upon recognizances, on default being made in their condition. Whatever be its interpretation and effect in respect to "recognizances forfeited in any Court of General Sessions of the Peace, or of Oyer and Terminer in any of the counties of this State," it does not operate as a repeal of special legislation upon the same subject, effecting and applicable only to the city of New York. As such special legislation was consistent with different general provisions of law, controlling in all other parts of the State, it is equally consistent with the provisions of the act of 1855; and no intent of the legislature to repeal or interfere with special statutes, applicable only to the city of New York, can be implied from general legislative action upon the subject. Repeal of statutes by implication is not favored, and only takes place when two acts are so inconsistent that both cannot stand, and then the later act prevails. Laws, special and local in their application, are not deemed repealed by general legislation, except upon the clearest manifestation of an intent by the legislature to effect such repeal, and ordinarily an express repeal by some intelligible reference to the special act is necessary to accomplish that end. But all questions in respect to the vitality of the law under consideration is answered by the law of 1861 declaring the same to "be in force, and that it shall be applicable to the city and county of New York." (Laws of 1861, chap. 333.) The act embraces but parts of one general subject, and each part of the act is closely connected with every other part,

and the whole subject, in all its details, is well expressed in the title: "An act in relation to fines, recognizances and forfeitures." (*Conner v. Mayor, etc.*, 1 Seld., 285; *In re Mayer*, 50 N. Y., 504.) The proceedings and entry of judgment upon the recognizances, were authorized by the act of 1844, expressly continued in force by the act of 1861.

The defendants urge as a further ground for vacating the judgments, that the summary method of perfecting judgments upon forfeited recognizances, authorized by the laws of 1844 and 1861, is in direct contravention of the fundamental doctrine embodied in the State Constitution, that "no person shall be deprived of life, liberty or property, without due process of law." (Cons., art. 1, § 6.) The same provision is found in the federal Constitution, in the form of a restriction upon the States. (Art. 14, § 1.)

It is sufficient to say that the defendants are not in a situation to take this objection. A party may, by his voluntary act, waive any and every right or privilege personal to himself, and affecting only his rights of property, conferred or secured to him either by the Constitution or by statute. (*Shufte v. Eimer*, 45 N. Y., 102; *Embury v. Conner*, 3 Comst., 511.) The law permitting judgment to be perfected upon the recognizances upon default in the condition, was in force at the time the recognizances were entered into and made a part of the terms and conditions of the undertaking and covenant of the parties, as much as if inserted bodily in the instrument. By the recognizances the defendants acknowledged an indebtedness to the people in the sum named, subject to a defeasance, and consented that upon a failure to perform the condition, the debt should become absolute, and might be made a debt of record and judgment perfected thereon, which should be a lien upon real property, and upon which execution might issue as upon other judgments for the recovery of a sum certain.

The cognizors voluntarily waived their right to any day in court other than that given them by the terms of the recognizance, and their consent to the remedy given by law, subject to and pursuant to which the recognizances were taken, was, as in the case of a bond and warrant of attorney for the confession of a judgment, a substitute therefor, and a waiver of the necessity of any other process of law.

The remedy taken pursuant to the act, and thus acquiesced in by the defendants, was "due process of law," and a compliance with the Constitution in that respect. The defendants had in truth a day in court, if that was essential to the validity of the proceedings. They undertook for the appearance, that is, that they would have the body of their principal in court at a time appointed, and it was their privilege to appear at that time with their principal, who was constructively in their custody, or show cause why they did not perform the condition, and legally excuse the default, and prevent a forfeiture of the recognizance.

The defendants also seek to avoid the judgments on the ground that they were taken in disregard of the provision of the Constitution of the United States (art. 7), declaring that in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and the Constitution of the State (art. 1, § 2), preserving inviolate the trial by jury in all cases in which it has been heretofore used. The right of a trial by jury, if any such right would have existed but for the special laws affecting the obligations and liability of the defendants, was waived by the terms of the recognizances and assent of the cognizers, and in all civil proceedings the right of a trial by jury may be waived. (*People v. Murray*, 5 Hill, 468; *Lee v. Tilotson*, 24 Wend., 337.) But the proceedings for judgment were not suits at common law, but a special statutory proceeding, summary in its character and unknown to the common law, and therefore not within the provision of the federal Constitution invoked by the defendants. Neither are proceedings for the forfeiture of recognizances, and enforcing their collection, cases in which a trial by jury has been heretofore used within the meaning of the State Constitution. The legal character and effect of recognizances, and their history, and the course of procedure in a default in a performance of their condition, as well at common law as under the statutes of the State, as they have varied from time to time, are considered in *Gildersleeve v. People* (10 Barb., 35), and *People v. Lott* (21 id., 130), and the policy and validity of the act of 1844 satisfactorily vindicated. It suffices to say now that a recognizance at common law and under the statutes of this State becomes and is, when prop-

erly filed and enrolled, a debt of record, subject to a condition that it shall be discharged or become void upon the performance of the thing stipulated. It is an obligation of record. They do not in this State bind lands at this time, but are merely evidences of debt. (2 R. S., 362, § 21.) Whether, when properly filed or enrolled, it is any the less a debt of record, that is, evidenced by the record, than at common law and the earlier statutes of the State, is not material, and need not be considered. But at common law and under the earlier statutes of this State, it was a debt of record, proved only by the record, and the forfeiture, upon default in the performance of the condition, was also matter of and proved by the record.

In actions upon recognizances, the trial was at common law by the record, and by the court and not by a jury, and even in actions upon recognizances an issue upon the existence of the recognizance, as well as the forfeiture were not triable by a jury. (Bac. Ab., Trial [B]; *Hoe v. Marshal*, Cro. Eliz., 131; *Welby v. Canning*, Kob., 210; 2 Arch. Pr., 873; *Knapp v. Mead*, 2 J. Cas., 111.) If the issue involved matters of fact, as well as matters of record, it was to the country. But it is enough that an action upon a recognizance was not necessarily triable by a jury, although questions of fact might arise in actions thereon properly triable in that form.

The remedies upon forfeited recognizances have at all times been subject to legislative action and regulated by statute, and summary proceedings, rather than formal suits at law, have been usually allowed.

It is only when common law actions are brought for their collection that they are within the rules prevailing in common law proceedings, and a jury trial may be demanded.

The orders must be affirmed.

All concur.

Order affirmed.

COURT OF APPEALS.

NEW YORK, 1875.

SHUFFLIN v. THE PEOPLE.

The accused was tried and convicted of murder in the second degree.

The court charged the jury that in murder there must be an intent to kill, and that to constitute manslaughter it was not necessary that there should be such intent; and that the courts looked leniently upon a man who slays his wife, when caught in the act of adultery, from the excitement consequent upon the discovery and a momentary deprivation of control on his part; and that was covered by the "heat of passion" when there was no intention to kill, as used in the statutes defining manslaughter.

The court submitted to the jury whether, from the evidence, they believed that the prisoner had caught his wife in the act of adultery, or that the circumstances justified him in concluding that she was committing adultery, and whether he was under the excitement and in the heat of passion which that discovery would be likely to produce, and did the act under it.

Held, that the charge was a clear exposition of the law. The meaning of it was, that if the prisoner killed his wife under these circumstances, and without a premeditated design to effect her death, the offence would be manslaughter in some of its degrees.

The counsel for the accused requested the court to charge: "that the law regards adultery as so great a provocation and makes such allowance for the passion which its discovery excites, that it *absolutely* reduces the grade of the offence of killing to manslaughter, and that in the lowest degree." This the judge refused, except as already charged.

Held, no error. The request does not confine the case to one of a sudden killing, immediately following discovery in the act; it might embrace one of a subsequent deliberate killing, out of jealousy or revenge, and it is far too strong in stating that the provocation absolutely reduces the grade of the offence. Whether it does or not, must depend upon the circumstances of each particular case. It cannot be laid down as a rule of law that adultery gives a license to kill either of the offending parties without being guilty of murder.

Held, further, that the question in all cases is, whether the act was done with intent to kill, or, whether it was done in the heat of passion engendered by the sudden discovery, and without intent to kill. Adultery, though provocation of the gravest character, is still but provocation, it is not justification; and every intentional killing, however extreme the provocation, is and was, under our statute, murder, unless justified as provided in the statute.

Charles W. Brooke, for the prisoner.

Benj. K. Phelps, district attorney, for the people.

RAPALLO, J. The judge, in charging the jury, instructed them explicitly as to the distinction between murder and manslaughter. That in murder there must be an intent to kill, and that to constitute manslaughter it was not necessary that there should be such intent. He further instructed them, that the courts looked leniently upon a man who slays his wife, when caught in the act of adultery, from the excitement consequent upon the discovery and a momentary deprivation of control on his part; that that was what was covered by the "heat of passion" when there was no intention to kill, as used in the statutes defining manslaughter. He then submitted to the jury to determine whether they believed the statement which the prisoner made on the subject of the difficulty with his wife, and the circumstances attending it. Whether they believed from the evidence that he caught her in the act of committing adultery, or that the circumstances surrounding the woman justified him in concluding that she was committing adultery, and whether he was under the excitement and in the heat of passion which that discovery would be likely to produce, and did the act under it. The clear purport of the charge was, that if the jury found that the prisoner killed his wife under these circumstances, and without a premeditated design to effect her death, the offence would be manslaughter in some of its degrees.

This, we think, was a correct exposition of the law, and fully covered the theory of the defence. No exception was taken by the prisoner's counsel to the charge as delivered, but he made two requests for a further charge, and the refusals to charge as thus requested present the only material exceptions in the case. The first request was to charge, "that if the jury believed that the prisoner detected the deceased committing adultery, and thereupon instantly struck her, and from the effect of such blow she died, the killing can only be manslaughter." This the court refused, except as already charged.

The charge, as previously given, embraced the proposition requested, with the qualifications only that the killing was done under the excitement and heat of passion, produced by the discovery, and not with intent to kill. We do not think the prisoner was entitled to have the charge repeated

without these qualifications. Furthermore, we agree with the General Term in the opinion that the evidence did not present circumstances to which the charge requested was applicable, but was entirely inconsistent with the hypothesis contained in the request—that is, that the prisoner instantly struck the deceased, and that from the effect of such blow she died. He insisted in his testimony—and in this he was corroborated by his mother, who was the only witness present at the time—that when he discovered his wife in the bedroom, and the man who was with her passed out, he dragged her into the sitting-room and there slapped her on the side of the face with his open hand, and that was all the violence he inflicted; that she was at the time so grossly intoxicated that she could not stand, and in passing around the stove she fell upon it; that she tried to get up and fell again upon the stove; that he then laid her down by the stove; she was in a nude condition. This occurred between nine and ten o'clock at night. That she afterwards got up and went out into the yard naked; it was a cold night in January; that he, the prisoner, remained sitting by the stove about an hour after she went out, and he then went out after her and found her lying naked in the snow; that he brought her in and laid her by the stove; that he then had more clothes put over her and went to bed; that in the morning she was found dead. He was positive that the only violence he inflicted on her was the slap in the face.

When found in the morning, by the police officers and others, she was lying by the stove dead. There were various bruises on her body; her scalp was torn off and thrown backwards from her forehead to the crown of her head, uncovering the anterior temporal arteries, which were injured and bleeding; she had a cut over the eyebrow and on the lip, and there was a large quantity of blood upon the floor and on the cloth or pillows upon which the head rested; there was also blood upon the snow in the yard. A keeper of a drinking saloon testified that about nine o'clock in the morning the prisoner came to his place to drink and told him that his wife was dead, that the night before he had come in, after taking some drinks, and a man ran out of his bedroom, and he commenced licking his wife; that he licked her pretty hard in the room and outside in the yard,

then threw water on her and got her into the room again and licked her on the floor and then went to bed to sleep. He then took the witness into the house and exhibited the body to him. Another witness testified that the prisoner, when asked about the scalping, said that it must have been done by kicks.

From this reference to the evidence it appears that the question of fact before the jury was, whether the injuries which caused the death resulted from the deceased falling against the stove by reason of her intoxication, as claimed by the prisoner at the trial — in which case he would have been entitled to an acquittal — or whether they were caused by a series of acts of brutality, continued through the night. They could not have found that the death resulted from the hasty blow struck by the prisoner at the beginning of the difficulty. His own evidence entirely rejects that idea. He says that after he slapped her she turned away and then returned, and in passing around the stove fell upon it. Neither of the witnesses say that the slap threw her on the stove.

The second request to charge was, "that the law regards adultery as so great a provocation and makes such allowance for the passion which its discovery excites, that it *absolutely* reduces the grade of the offence of killing to manslaughter, and that in the lowest degree." This the judge refused, except as already charged.

Much of what has been said in reference to the first request is also applicable to this. The judge had already charged all that was required on the subject of the provocation of adultery. But the proposition as a general proposition of law, in the unqualified form in which it is presented by the request, cannot be sustained. In the first place, it does not confine the case to one of a sudden killing, immediately following discovery in the act. It might embrace one of a subsequent deliberate killing, out of jealousy or revenge. (Foster's Criminal Law, 296; *State v. Samuel*, 3 Jones' Law [N. C.], 74; *Rex v. Kelly*, 2 Car. & Kir., 814.)

Secondly, it is far too strong in stating that the provocation *absolutely* reduces the grade of the offence. Whether it does or not, must depend upon the circumstance of each particular case. It is often stated in elementary books and

in judicial opinions, in general terms, that if a man kill his wife or the adulterer in the act of adultery, it is manslaughter. But this is not a proposition of universal application as matter of law, and although practically the result indicated would generally follow, cases may be supposed where the crime would still be murder. It cannot be laid down as a rule of law that adultery gives a license to kill either of the offending parties without being guilty of murder. The language often found in the books is sustained by the report of *Manning's Case* in Sir T. Raymond's Reports (p. 212). "The jury found that Manning found the person killed committing adultery with his wife, in the very act, and flung a pointed stool at him, and with the same killed him; and resolved by the whole court that this was but manslaughter; and Manning had his clergy at the bar and was burned in the hand; and the court directed the executioner to burn him gently, because there could not be greater provocation than this." But, in a more accurate report of the same case contained in Ventris (p. 158), under the title of *Maddy's Case*, it appears that the verdict was special; and that the jury also found that the prisoner had no previous malice toward the deceased, and this was an important consideration upon which the judgment turned.

TWISDEN, who presided at the trial, said there was a case found before justice JONES which was the same as this, except that it was found that the prisoner being informed of the adulterer's familiarity with his wife, said he would be revenged of him; and after finding him in the act, killed him, which was held to be murder, which the court said might be so by reason of the former declaration of his intent.

The question in all these cases must necessarily be whether, as stated by BRADY, J., in his charge to the jury, the act was done with intent to kill or in the heat of passion engendered by the sudden discovery, and without intent to kill.

The proposition contained in the second request was defective in not negating the intent to kill, and this omission is fatal to both requests. The killing of a human being with a premeditated design to effect death, even under the extreme provocation of finding him or her in the act of

adultery, would, under the statute of this State as it stood at the time of the offence in this case, have been murder in the first degree, and, under the judicial construction which had been put upon that statute, it would have been sufficient if the intent were formed the instant before the killing. By the amendment of 1873, to constitute murder in the first degree the design must be not only premeditated but deliberate. If the killing is intentional, but not deliberate and premeditated, it is murder in the second degree. But, as the law then stood, and still stands, every killing of a human being without the authority of the law was and is either murder in the first or second degree, or manslaughter, or excusable or justifiable homicide. (2 R. S., 656, § 4.) Every definition of manslaughter, except when the homicide is unnecessarily committed in resisting an attempt to commit felony, expressly excludes an intent to kill; and, therefore, to reduce the offence to that grade the proposition should have excluded such intent. Every definition of excusable homicide requires that the killing be by accident, or accident and misfortune, and excludes the idea of an intentional killing. The cases of justifiable homicide are defined, and do not include the case specified in the request. Adultery, though provocative of the gravest character, is still but provocation, it is not justification; and every intentional killing, however extreme the provocation, is and was, under our statute, murder, unless justified as provided in the statute.

For all these reason, we are of opinion that the requests to charge were properly refused.

None of the other exceptions appear to us to require further attention than they have received in the opinion delivered at General Term. Although there are extenuating circumstances in the case, and a verdict of manslaughter might well have been rendered, there being very slight evidence of an intent to kill, we find no error of law requiring a reversal of the judgment.

Judgment affirmed.

All concur.

Judgment affirmed.

SUPREME COURT.

Third Department — New York, 1874.

ROSEKRANS v. PEOPLE.

The accused was indicted for forgery. Upon his arraignment he demurred to the whole of the indictment, and to each and every count therein.

Judgment was given for the people upon the demurrer.

The indictment contained five counts, and was for forgery in the third degree, in forging and counterfeiting an instrument in writing, purporting to be an account of one Samuel Johnson for alleged services as constable against the county of Saratoga, together with the affidavit and jurat thereto attached, including the certificate of the justice.

The first objection was that the indictment did not contain a criminal offence; inasmuch as the crime of forgery could not be predicated upon the instrument set forth in the indictment.

Held, that the statute provides, that "every person who, with intent to injure or defraud, shall falsely make, alter, forge, or counterfeit * * * any instrument or writing, being, or purporting to be, the act of another, by which any pecuniary demand or obligation shall be, or shall purport to be, created, increased, discharged or diminished * * * by which false making, forging, altering, or counterfeiting, any person may be affected, bound, or in any way injured in his person or property, upon conviction thereof, shall be adjudged guilty of forgery in the third degree;" and that it "shall be sufficient, if such intent appear to defraud * * * any county, city, town or village * * * or any person whatever." These provisions are sufficiently comprehensive to include the instrument in question. It is a writing purporting to be the act of another, by which a pecuniary demand is purported to be created, and by which another might have been affected, and it is alleged that it was falsely made, forged and counterfeited by the defendant with intent to defraud the county of Saratoga. If the instrument was complete in itself, and sufficient on its face to have induced an acceptance and allowance of the account by the Board of Supervisors, so that it might have produced injustice if the fraud had not been detected, it was the subject of forgery under the statute. It is clearly within the letter and spirit of the statute, and would have been sufficient as the foundation of an indictment at common law.

It is objected that each count separately, is bad for duplicity.

Held, that there is no force in the objection. The account and the signatures to the affidavit and jurat, were all essential to the completion of the instrument before it could be properly presented to the Board of Supervisors; and all of them, therefore, constituted but one instrument.

L. Tremain, for the prisoner.

H. Smith, for the people.

COUNTRYMAN, J. The first objection raised by the demurrer presents the question whether the indictment contains a criminal offence. It is insisted that the crime of forgery cannot be predicated upon the instrument, a copy of which is set forth in each count of the indictment. The statute provides, that "every person who, with intent to injure or defraud, shall falsely make, alter, forge, or counterfeit * * * any instrument or writing, being, or purporting to be, the act of another, by which any pecuniary demand or obligation shall be, or shall purport to be, created, increased, discharged or diminished * * * by which false making, forging, altering, or counterfeiting, any person may be affected, bound, or in any way injured in his person or property, upon conviction thereof, shall be adjudged guilty of forgery in the third degree." (2 R. S., 673, § 33.) By another provision it is declared that it "shall be sufficient, if such intent appear to defraud * * * any county, city, town or village * * * or any person whatever." (2 R. S., 675, § 46.) We think these provisions are sufficiently comprehensive to include the instrument in question. It is a writing purporting to be the act of another, by which a pecuniary demand purported to be created, and by which another might have been affected, and it is alleged that it was falsely made, forged and counterfeited by the defendant with intent to defraud the county of Saratoga. The revisers, in their note to the first section above cited, state that it was intended, "to reach every case of forgery that ever has been committed, or that ever can be committed," not otherwise specially provided for, and their complete success in giving expression to their intention, has since been repeatedly affirmed by the courts. (*Noakes v. The People*, 25 N. Y., 380, 384; *People v. Stearns*, 23 Wend., 634, 637.)

Section 45 (2 R. S., 675) does not limit the meaning of the provisions in the previous sections, nor was it intended as a general definition of the document described as an "instrument or writing" but was merely enacted to remove all doubts in regard to the special cases therein mentioned, so that "every instrument partly printed and partly written, or wholly printed with a written signature thereto" should be included. Nor was it essential that a legal liability or

obligation should have been created by the instrument upon which an action could be maintained. It was sufficient that it purported to create a pecuniary demand, by which another might be affected or injured. If the instrument was complete in itself, and sufficient on its face to have induced an acceptance and allowance of the account by the board of supervisors, so that it might have produced injustice if the fraud had not been detected, it was the subject of forgery under the statute. (*People v. Stearns*, 21 Wend., 409, 414; *People v. Krummer*, 4 Park. C. R., 217.) Now this document purports to be a formal bill or statement of an account, on the part of a public officer, for services against the county of Saratoga, setting forth the items in detail, with an affidavit of the claimant, as required by law, constituting, apparently, a legal claim, in proper form to be audited and paid. It is clearly within the letter and spirit of the statute, and would have been sufficient as the foundation of an indictment at common law.

The next objection is of a more special character, and relates to each of the counts separately, as bad for duplicity. It is insisted for the defence, that the bill or account, signature to the affidavit, and signature to the jurat or certificate, are different instruments or writings within the meaning of the statute, and hence, that the forgery of each of them is a distinct offence; so that they cannot properly be united in the same count. The general rule is familiar, that two or more separate criminal offences cannot be joined in one count. The public prosecutor may, however, allege in the indictment several felonious acts, which, in themselves separately considered, are distinct offences, so far as they are essential portions of one continuous transaction or connected charge, and collectively constitute but one offence, and may set forth in different counts various versions of the same charge or transaction, alleging different grades or degrees of the principal offence, provided, as thus alleged, they may all be merged in one, and do not necessarily constitute different and distinct offences. But each count should contain only one version of one offence, or one degree of the principal offence, and should be complete in itself, and unconnected with the others for any purpose, except, perhaps, special reference to particular allegations, to avoid unneces-

sary repetition. And it is never permissible to allege in one and the same count facts which constitute separate and distinct offences, created by different statutes and requiring different degrees of punishment. (1 Bishop on Crim. Proc., §§ 432-439, 449 and note; *Reed v. The People*, 1 Park. Cr. R., 481; *People v. Wright*, 9 Wend., 193; *People v. Ryn- ders*, 12 id., 426; *Nelson v. The People*, 23 N. Y., 293, 297.) It is, however, a misapprehension of the legal effect of the document, set out in the indictment, to call the account and the signature to the affidavit and jurat there separate instruments, as they were all essential to the completion of the account before it could be properly presented to the board of supervisors (Laws of 1847, ch. 490, § 24); and all of them, therefore, constituted but one instrument.

Unless the affidavit had been attached, the account itself would not have been a legal instrument on its face, and the crime of forgery, in reference to it, could not have been committed. (*Vincent v. The People*, 11 Abb., 234; *People v. Harrison*, 8 Barb., 560; *People v. Gallomey*, 17 Wend., 540.) And, as the forgery of the account and the signature to the affidavit and certificate must be sustained under the same section of the statute, this disposes of the objection of duplicity as to them, if they were all made at one time and as one act or transaction. But the first count alleges each of these parts of the paper separately, as different instruments, and each act of forgery as distinct and independent; and, although it fails to make a proper allegation of the forgery of the signature to the certificate against the defendant, it must be regarded as double within the rule. The second and third counts, on the contrary, allege the forgery of the whole paper, as one instrument and as one act or transaction, and are not therefore obnoxious to this objection. There is no force in the suggestion that the alleged forgery is the joint act of Johnson and Gorsline, whereas their signatures purport to be attached separately to the affidavit and jurat annexed to the account, as the allegation is that the entire instrument was forged, and each of the signatures are attached to and form a part of the instrument. It is proper to allege, in the same count, an offence upon two or more persons, when it was the result of a single act, or was

all one transaction (1 Bishop's Crim. Proc., § 437, and cases cited).

But it is also insisted, that the second and third counts are bad for duplicity, as well as the first, because the distinct offence of uttering the instrument is joined with the offence of forging the same. It is a sufficient answer to this objection, that if the pleader intended to charge such an offence, which is not apparent, he utterly failed. It is alleged in each of these counts, after averring the forgery of the instrument, that the defendant "feloniously presented and caused it to be presented for audit against the county of Saratoga." There is no allegation that he "uttered and published it as true," which is essential, both at common law and under the statute. In order to render the counts objectionable, they must describe two offences in adequate terms. Otherwise the additional allegations will be regarded as surplusage. (1 Bishop Crim. Proc., § 440; *Dawson v. The People*, 25 N. Y., 399, 402.)

The fourth count is clearly good within all the authorities. An indictment which alleges that the defendant falsely made, forged, and counterfeited an instrument within the statute, with intent to defraud, setting forth the instrument *in haec verba*, is a sufficient description of the circumstances to constitute the offence. (*Holmes v. The People*, 15 Abb., 154; *People v. Rynders*, 12 Wend., 425; *People v. Clements*, 26 N. Y., 193.)

Judgment must therefore be ordered for the defendant on the first count, and for the people on the second, third and fourth counts; and the judgment below on the indictment must be affirmed, with leave to the defendant to plead if he shall be so advised.

Present — BOCKES, P. J., COUNTRYMAN and LANDON, JJ.

Judgment accordingly.

SUPREME COURT.

Third Department—New York, 1874.

SHAW V. THE PEOPLE.

The accused was indicted for the murder of his wife, by poisoning with corrosive sublimate, and Sarah Briggs was jointly indicted with him, as accessory before the fact.

On the trial it was shown by the people, under objection, that the deceased stated during her illness, and after she had abandoned hope of recovery, "that Charles and the Briggs woman was the cause of all this suffering, the cause of all this. That Charles and the Briggs woman knew all about this—something to that effect." "I talked with Mrs. Shaw only once about the cause of her sickness; she said she expected it was Charles and Mrs. Briggs."

Held, that these declarations were erroneously received, for the reason that they were not narratives of facts, but were conclusions or conjectures of the deceased as to the cause of her illness. Neither of these statements would have been competent evidence if the deceased had been alive and examined as a witness under oath; and they were therefore equally inadmissible as dying declarations.

The counsel for the accused offered to prove that the deceased said several days before her sickness, "that she had poison and knew how to use it; and that rather than Mrs. Briggs should have her children, she would put them all under the sod;" and also, "that rather than Mrs. Briggs should be step-mother to her children, she would put them under the sod." The court rejected the evidence and an exception was taken.

Held, error. The prosecution were permitted to give in evidence the threats of the accused against the life of the deceased, and it was equally proper for the accused to prove the threats of the deceased against her own life and the lives of her children.

The court for the trial of the prisoner was organized by there being upon the bench the circuit judge, the county judge of Washington county, and the two justices of the peace, designated as justices of the Sessions of said county. Several days were devoted to the taking of evidence, and an adjournment was had over Sunday. On Monday, when the court re-assembled, *Justice Steere* was absent. The trial proceeded and evidence was taken on Monday, and on Tuesday *Justice Steere* returned and resumed his seat upon the bench, joined the court, and took part in its deliberations during the subsequent part of the trial.

Held, that the participation of *Justice Steere* in the trial after his absence from the court-house, while the whole of Monday's evidence was given, was against the provision of the law and Constitution giving a jury trial before a regularly constituted court, the members of which should hear all the evidence and proceedings.

Charles Hughes and D. M. Westfall, for the prisoner.

M. D. Grover and James Gibson, for the people.

COUNTRYMAN, J.: The declarations of the deceased, received in evidence, were shown to have been made *in extremis*, within the rule rendering them admissible as dying declarations. But in two instances they were, nevertheless, erroneously received, for the reason that the declarations were not narratives of facts, but were conclusions or conjectures of the deceased as to the cause of her illness. In one instance the declaration was, that the defendant and Mrs. Briggs were the *cause* of all her sufferings; and, in the other, in answer to an inquiry of the cause, that she *expected* it was Charles (referring to the defendant) and Mrs. Briggs. No facts were stated to the witnesses testifying to these declarations, directly or indirectly connecting the defendant with her misfortune, or from which an inference could be drawn by the court or jury concerning his connection with the alleged crime; but the declaration, in one instance, was a bare assertion of her opinion that he was the cause, and in the other a mere expression of her suspicion to the same effect. Neither of these statements would have been competent evidence if the deceased had been alive and examined as a witness under oath; and they were therefore equally inadmissible as dying declarations. (1 Greenl. Evidence, § 159; Roscoe's Crim. Evidence, 28, marg.; Wharton's Crim. Law, § 678.) The limitations of the rule allowing the reception of this kind of evidence, should be strictly observed. It is even more important to exclude an opinion declared *in articulo mortis*, than in an ordinary case, where the witness may be subjected to a cross-examination. In the latter case, the grounds of the opinion may be ascertained, and, if unfounded or untenable, the error exposed; while, in the former, there is no opportunity or means of testing its accuracy. The bare assertion and reiteration of an inference or conclusion, which may have been honestly but mistakenly entertained, and may have been founded on mere suspicion or conjecture, were, in this case, committed to the consideration of the jury as equivalent to positive statements of the fact, made on the personal knowledge of

the declarant. The evidence was clearly incompetent, and may have had a material influence on the verdict. It would be exceedingly hazardous, at least, to assume that it did not, or to speculate upon the probable weight attached to it in the deliberations of the jury. It is urged that the defendant is not in a position to avail himself of these errors, as the objections and rulings were made and exceptions taken to the questions, which it is claimed were proper in form, and not to the answers of the witnesses; and it is insisted that if the answers or any portion of them were improper, it was incumbent on the defendant to have moved to strike them out, and thus have raised the points as to their incompetency. This criticism, if technically correct, should hardly be entertained in a capital case; but it is not well founded in fact. The questions called for the conversations of the deceased "About the cause of her sickness or condition;" to which the defendant objected as "incompetent and inadmissible," among other grounds; and the answers were directly responsive to the questions. The defendant is therefore entitled to raise the points and review these erroneous rulings.

It was also an error to exclude the declarations or threats of the deceased, made several days prior to the illness of herself and children, that she had poison and knew how to use it; and that rather than Mrs. Briggs should have her children, she would put them all under the sod. It is insisted, for the prosecution, that these declarations were no part of the *res gestæ*, and are strictly within the rule excluding hearsay evidence. The case has many remarkable features. It was the theory of the prosecution that the deceased and four of her children were poisoned at one time and in the same manner, three of the children and the mother dying from its effects, while the other child finally recovered. Evidence was therefore given of the acts of the accused toward the children as well as the wife, and the effects produced on all of them by the potions which were administered, including the *post mortem* examinations and chemical analyses of their remains. The dying declarations of the wife were received; some of them, according to the testimony, directly tending to inculcate the accused as the person who administered the poison, and others delivered later

to the coroner completely exonerating him from all criminal responsibility. It was also proven that the defendant had repeatedly threatened the life of his wife, prior to her illness, and made other declarations indicative of personal hostility and evil designs; and as a motive for the crime, evidence was received tending to show the existence of illicit relations between the defendant and Sarah Briggs. On the other hand, upon the assumption that the deaths were the results of criminal agencies, it was the theory of the defence, that all the poison was administered by the wife and mother herself, under the exasperating influences, if not an actual delirium, of jealousy. The issue therefore on this branch of the case was direct and clear, that the poison was administered either by the accused or the deceased, the prosecution endeavoring to prove the former and the defence the latter theory. It is true the defendant also contended that the deaths had ensued from innocent causes, as the reception of deleterious food into the system, which, in the process of chemical change, generated the poison. But in the event the jury were satisfied that criminal means had been employed, it was equally important and indispensable to the accused to show, if he could, that he was not the criminal. How could he do so more effectually than by proving that the real criminal was the deceased herself? All of the acts and declarations of the accused and the deceased, tending to throw light upon the cause of death, or upon any criminal relations of either of them with the proximate cause, were accordingly proper and original evidence; the acts and declarations of the accused, in favor of the prosecution, to prove his alleged guilt, and the acts and declarations of the deceased, in favor of the defence, to sustain the theory of suicide. The prosecution were properly permitted, in support of their theory, to give in evidence the threats of the accused against the life of the deceased, but it was equally proper and essential to the rights of the accused, that he should have been allowed to prove the threats of the deceased against her own life and the lives of her children. This was the best evidence, in the nature of things, that could be produced. Indeed it was the only evidence, and therefore admissible from necessity. There is no difficulty with this question on principle or the rules

of evidence. It is not necessary to regard these threats as a portion of, or as characterizing the principal transaction, and therefore admissible as a part of the *res gestæ*, although the rule limiting this class of evidence merely to contemporaneous acts and declarations, is properly undergoing material modification. (*Insurance Company v. Mosley*, 8 Wall., 397; *Hanover R. R. Co. v. Coyle*, 55 Penn., 402; *Ransom v. Hoigh*, 2 Bingh., 99; *Commonwealth v. M'Pike*, 3 Cush., 181.) But it was original evidence as distinguished from hearsay. The term hearsay, in its legal sense, as defined by the elementary writers, denotes that kind of evidence which does not derive its value solely from the credit to be given to the witness himself, but rests, also, in part, on the veracity and competency of some other person. (1 Greenl. Ev., § 99; 1 Phill. Ev., 185.)

The narrative given of past transactions by the deceased, before she was under apprehension of death, as testified to by a witness who heard it, would clearly fall within the rule as hearsay, because, in determining the material question whether the narrative was true, it would be necessary to consider the credibility of the witness, and the veracity of the declarant. But the declarations of third persons, not under oath, do not always relate to past transactions, and are not therefore necessarily hearsay. Very often the material fact to be ascertained from the evidence simply is, whether the alleged threat or declaration was made, and not whether as a statement or narrative it was really true. In such a case the mere fact whether the declaration was made, depends solely on the credibility of the witness who testifies that he heard it, and such testimony is, therefore, strictly and properly original evidence. Now, it was a material fact, under the issues in this case, whether the deceased had ever threatened to resort to poison for the purpose of self-destruction, or the destruction of her children. It was, if true, an independent fact, of more or less importance, according to the circumstances, although it did not follow that she had actually carried the threat into execution.

The threat to commit suicide (whether in direct terms or by implication would only affect the weight of the evidence), was as competent and material for the defence as were the threats of the accused against her life for the prosecution.

The utterance of the threat is received in evidence as a fact or circumstance indicating an intention on the part of the person making it to commit the crime ; and, if the intention be clearly shown, a probability is thereby created, that, upon a favorable opportunity, it would be carried into effect. But this result, or probability, is wholly a matter of inference for the court or jury, in determining the weight to be given to the fact that the threat was made, in connection with the other evidence in the case. Until the fact is established, there is no ground for the inference, and the proof of the fact depends exclusively on the amount of credit to be given to the witness. This precise question does not seem heretofore to have been the subject of judicial investigation in this State. The rule, however, above stated, was recognized, and similar declarations admitted, by a very eminent authority on evidence, from his great learning and experience as a *nisi prius* magistrate, the late JUDGE EDMONDS, in the case of *People v. Knapp*. (1 Edmonds' Select Cases, 177.) Similar declarations were also held admissible, and the general doctrine considered and approved by the Court of Appeals, in the recent case of *People v. Stokes*, (53 N. Y., 164, 174.) And in other States, whenever the question has been judicially examined, the same general conclusion has been adopted. (*State v. Goodrich*, 19 Verm., 116 ; *Keever v. The State*, 18 Ga., 194, 224-228 ; *Commonwealth v. Wilson*, 1 Gray, 337 ; *Campbell v. The People*, 16 Ill., 17 ; *Cornelius v. Commonwealth*, 15 B. Mon., 539.)

For these errors the conviction and judgment must be reversed, and a new trial granted.

HARDIN, J.: Courts of Oyer and Terminer shall be composed of a justice of the Supreme Court, *who shall preside*, the county judge and the justices of the peace, designated as members of the Court of Sessions, and the presiding justice, and any two of the other officers above mentioned, shall have *power* to hold said court. (Vol. 4, N. Y. Stat. [Edms. ed.], 566, sec. 38.)

Under this provision the court was properly organized, when the trial was commenced before a circuit judge, the county judge of Washington county, and the two justices of the peace, designated as justices of the sessions of said

county. Several days were devoted to the taking of evidence, and an adjournment over Sunday had, before a court regularly and properly constituted. When the court reassembled, Justice STEERE was absent, and the court proceeded, composed of one justice of the peace, the county judge and the circuit judge. The evidence taken on Monday, and during the absence of Justice STEERE, was taken before a court composed of three of the officers named in the statute having "power to hold said court." If the trial had continued to its close before the court thus constituted it may be conceded that it would have been regular, and no error could have been predicated upon the absence of Justice STEERE. But on Tuesday morning, after his absence from the court on Monday, and without having heard the evidence given during Monday, and without having read the evidence thus given during his absence, and without the evidence being again given, Justice STEERE returned to the court-room, resumed his seat upon the bench, joined the court, and took part in its deliberations and all the subsequent part of the trial. Whenever an objection was made by the prisoner's counsel to evidence, and it became necessary for the court to deliberate upon the proper ruling, Justice STEERE took part, it must be assumed, and his voice and vote were as potential in affecting the rights of the prisoner, as well as the interests of the prosecution, as the vote of the other justice of sessions, the county judge or even the circuit judge. The latter three had heard all the evidence given upon the trial, and therefore could intelligently and understandingly pass upon the question involved in the deliberation. Certainly their understanding and intellects were better prepared, by reason of having heard the whole evidence, than was STEERE's who had not heard the evidence taken on Monday, when he was absent from the court house. His vote and voice upon any question arising upon the trial after his return, may have produced a different result from what they would, had he remained during the whole trial, heard the whole evidence, and given his reflective judgment to it, preparatory to voting and speaking in the deliberations which ensued after his return to the bench which he had, so far as the parts of the trial which took place on Monday, vacated and abandoned. It is not for us

to speculate, in a case where the life of a prisoner is involved, as to the extent of the influence of the vote and voice of one who has not heard the whole evidence. The prisoner is entitled to the full benefit of the understanding and judgment of those who take part in the judicial deliberations which affect his life; he is entitled to all the forms of law, to all the provisions of the Constitution by which his rights are secured. Where life is involved, the law humanely provides that the prisoner stands upon all his rights, and does not and cannot waive them. (*People v. McKay*, 18 John., 212; *Cancemi v. People*, 18 N. Y., 128; *Arundell's Case*, 6 Coke, 14; *People v. White*, 22 Wend., 167; *S. C.*, 24 id., 520; *Safford v. People*, 1 Parker Cr. R., 474; *Shepherd v. People*, 25 N. Y., 406; *Blend v. People*, 41 id., 606; *Messner v. People*, 45 id., 1; *Stokes v. People*, 33 id., 164; *Dohring v. People*, 2 S. C. R., 458.)

The learned counsel for the people insist that no error was committed by reason of the absence during a portion of the trial of Justice STEERE. But we cannot say that no injury was done to the rights of the prisoner, for it manifestly appears that it may have done him some injury. (*Shorter v. People*, 2 Comst., 193; *Willis v. People*, 5 Parker, 647; *People v. Fernandez*, 35 N. Y., 49; *Fralich v. People*, 65 Barb., 48; *Stokes v. People*, 53 N. Y., 164.) It is provided by statute, that no judge shall decide "or take part in the decision of any question which shall have been argued in the court when he was not present and sitting therein as a judge." (2 Revised Statute [Eds. ed.], 284, section 2.) Though the technical language of that section may not apply here, yet the same reasons exist for holding that STEERE should not take part in the decision necessary to be made, after his return to the trial, as apply under the statute above cited to prevent a judge from deciding when he has not heard the argument. We are referred to *Corning v. Slosson* (16 N. Y., 294), by the learned counsel for the people, where it was held, that three judges might hold a General Term and render a decision, when only two of them had heard the argument of the cause. In that case two constituted a majority of the court, and it was assumed that in the decision they concurred, and that they had conferred with their associate who heard the argument, but did

not sit when the decision was handed down, and that the judge who had not heard the argument, and did sit to constitute a quorum when the decision was handed down, took no part in the decision. Here it must be assumed that justice STEERE participated in the trial, which resulted in the prisoner's conviction and sentence of death; that at one stage of the trial, to wit, when the sentence was pronounced, he was essential to constitute a quorum. It was held in the case in 45 New York (*supra*), that asking the prisoner what he had to say, why the sentence of the court should not be pronounced, was part of the trial, and that its omission was error, and such a one as called for a reversal and a new trial, and that the court could not say that a regular and legal trial had been had, and under the amendment of 1863 remitted the record for the proper sentence and judgment. Also in *People v. Lake* (2 Kern., 362), it was held to be error in a Court of Oyer and Termine, to permit a physician who did not hear all the evidence relating to the mental condition of the prisoner, to give opinions as to her sanity founded on the portions of the evidence heard by him. By parity of reasoning it may be said to be erroneous for the member of the court to take part in the deliberation, consultation and rulings, when he has not heard the whole evidence given upon the trial. (*McCann v. People*, 3 Park. C. R., 272.) The participation of Justice STEERE in the trial after absence from the court-house, while the whole of Monday's evidence was given, was against the provision of the law and Constitution giving a jury trial before a regularly constituted court, the members of which should hear all the evidence and proceedings. It certainly is against public policy to allow a party to be deprived of his life by a tribunal, of which it can be said, that a portion thereof has not heard the whole evidence and proceedings which result in the sentence of death.

These views as well as those expressed in the elaborate and able opinion of brother COUNTRYMAN, lead me to vote for a reversal of the conviction.

BOCKES, P. J., and HARDIN, J., concurred in the opinion delivered by COUNTRYMAN, J.

Conviction and judgment reversed, and new trial granted.

COURT OF APPEALS.

NEW YORK, 1875.

GODFREY v. THE PEOPLE.

The accused was convicted of the crime of mayhem. The General Term of the first judicial department affirmed the judgment of the Court of General Sessions, of the city and county New York. The accused brought error.

The evidence showed, that the accused and the complainant had been playing cards together and got into a quarrel over the game, which resulted in a fight. The parties closed and during the struggle the accused bit off a piece of complainant's ear.

The counsel for the accused asked the court to direct the jury to acquit on the ground, that the offence of mayhem was not proved, as it was not shown that there was a premeditated design "evinced by a lying in wait for the purpose, or in any other manner" as prescribed by the statute. The court refused so to direct the jury, and the counsel for the prisoner excepted.

The court charged the jury: "If you should be satisfied from the evidence, beyond a reasonable doubt, that the prisoner did wilfully and intentionally seize the complainant's left ear with his teeth with the intention of biting it off, and did wilfully and intentionally bite it off on purpose, you will be authorized to find that he bit off the ear from premeditated design, though you should find from the evidence that his design, or intention thus to seize and bite off the ear, was first premeditated or originated but an instant before he seized the ear with his teeth." To all which the counsel for the accused excepted.

Held, that the statute under which the plaintiff was indicted and convicted reads as follows: "Every person who, from premeditated design, evinced by laying in wait for the purpose or in any other manner, or with intention to kill or commit any felony, shall (1) cut out or disable the tongue; or, (2) put out an eye; or, (3) slit the lip or slit or destroy the nose; or, (4) cut off or disable any limb or member of another, on purpose, upon conviction thereof shall be punished," etc.

Held, further, that according to the statute there must be a premeditated design, which must be shown by lying in wait for the purpose, or in some other manner. There must be a design or intention existing and a purpose to do this very act, and this must be the result of premeditation. The words "in any other manner," must be construed in connection with and in reference to those which precede them in the same section; and when thus interpreted they evidently mean in *like or similar manner*.

Held, further, that this interpretation of the language stated is also sanctioned by the last clause of the section, which provides that the cutting off or disabling of any limb or member must be done "on purpose." Where the offence is committed within the meaning of the statute, it must be done "on purpose" as well as with a "premeditated design."

Mitchell Laird, for the prisoner.

Benj. K. Phelps, district attorney, for the people.

MILLER, J. The statute under which the plaintiff was indicted and convicted is as follows :

"Every person who, from premeditated design, evinced by laying in wait for the purpose or in any other manner, or with intention to kill or commit any felony, shall (1) cut out or disable the tongue; or, (2) put out an eye; or, (3) slit the lip or slit or destroy the nose; or, (4) cut off or disable any limb or member of another, on purpose, upon conviction thereof shall be punished," etc. (2 R. S., 664, § 27.)

A question is made by the prisoner's counsel whether, as the case stood upon the evidence, the prisoner could be convicted of the crime of mayhem. This question was presented upon the trial in the request and refusal to charge that he could not, and by an exception to that portion of the charge in which the judge charged the jury that if they found, from the evidence, that the prisoner wilfully and intentionally seized the left ear of the complainant with his teeth, at any time during the affray, with the intention of biting it off, and did wilfully and intentionally, and on purpose bite it off, that though the intention to bite off his ear originated or was first meditated but an instant before he seized the ear, they would be authorized to find that he bit the ear off from "*premeditated*" design, within the meaning of the statute.

According to the statute there must be a premeditated design, which must be shown by lying in wait for the purpose, or in some other manner. There was no evidence upon the trial to establish that the prisoner lay in wait for the complainant, or that, prior to the time of the commission of the alleged offence he had contemplated or intended to do the act. The proof evinces that it was done upon the impulse of the moment, in an affray which originated unexpectedly, with no previous ill feeling, except what arose at the time, or apparent intention on the part of the prisoner or the prosecutor to engage in any such altercation as produced the consequences which ensued. There was, then, no premedi-

tated design evinced by lying in wait for such a purpose, within the meaning of the statute, and, under the circumstances presented, it is certainly not clearly apparent how or in what form, such premeditated design is evinced in "any other manner." The last words are not very explicit, and somewhat general, but they cannot, without a constrained construction be held to mean that they include cases of simple assault and battery where there is no direct proof of any intent or purpose which results unfortunately in the loss or disabling of some member of the body of the person assailed. If such a result should occur in an ordinary affray by accidental circumstances and without any manifest intention, no case would be established within the meaning of the statute. There must be a design or intention existing and a purpose to do this very act, and this must be the result of premeditation. The words cited must be construed in connection with and in reference to those which precede them in the same section; and when thus interpreted they evidently mean in any *like* or *similar manner*. There are numerous instances where full force and effect may be given to this language where a premeditated design has existed without lying in wait for that purpose, while it would not be applicable to cases where no such intention had been formed or proved. Take the case of a person who had determined and threatened to cut off an ear, put out an eye or to disable some limb or member of the body of another, and preparing himself with the necessary weapon for that purpose should meet the individual against whom his animosity was directed and commit the offence, or if, perchance, when seeing him at a distance he should follow him, suddenly rush upon his victim and carry his intention into execution. These cases, without referring to others which might be named, are sufficient to show how the language employed could be made effective and have full operation.

This interpretation of the language stated is also sanctioned by the last clause of the section, which provides that the cutting off or disabling of any limb or member must be done "on purpose." If the offence was committed within the meaning of the statute, it must have been done "on

purpose" as well as with a "premeditated design." There is no real ground for claiming that there was premeditation and a purpose existing at any time during the progress of the conflict when the passions of both parties were roused and there was no time or opportunity for reflection or deliberation. Such an assumption would be contrary to the natural inferences to be drawn from the circumstances and the situation of the parties at the time, and looking at them it cannot be fairly claimed that the prisoner intended to commit the offence of which he was convicted.

An argument is made by the learned counsel for the prosecution, to the effect that the doctrine of instantaneous malice under the old law of murder is applicable, and that the definition of premeditation, as applied to such a case, may be invoked. I cannot concur in this view. In cases of homicide, where the offence is committed by means of weapons, or by the use of violence sufficient to produce death, such a rule might well be applied, because every circumstance tends to show that the result was intended. But this differs widely from a case of simple assault and battery where there was a hand to hand fight, without any weapon which could be used to maim or disable, and every intentment is against any such purpose.

Another answer to this position is, that the statute of mayhem in England as well as in this State, was evidently intended to provide for cases where there was an antecedent and secret purpose to commit the act, and not for casual and sudden affrays, where the act was done in the heat of the strife and with no direct evidence of any such intention.

It is evident that the offence of mayhem was not made out, and that the judge erred in refusing the request made, in that portion of the charge referred to. Questions are made as to the form of the indictment as well as to some other rulings on the trial; but the consideration of them is not required, as sufficient already appears to reverse the judgment.

Judgment should be reversed and new trial granted.

All concur.

Judgment reversed.

NOTE.—The Penal Code changes the name of the crime discussed in the foregoing opinion, from *mahem* to *maiming*, and defines the crime and determines the punishment as follows :

“§ 206. A person who wilfully, with intent to commit a felony, or to injure, disfigure or disable, inflicts upon the person of another an injury which,

1. Seriously disfigures his person by any mutilation thereof ; or,
2. Destroys or disables any member or organ of his body ; or,
3. Seriously diminishes his physical vigor by the injury of any member or organ,

Is guilty of maiming, and is punishable by imprisonment for not less than three, nor more than fifteen years. The infliction of the injury is presumptive evidence of the intent.

“§ 207. A person who, with design to disable himself from performing a legal duty, existing or anticipated, inflicts upon himself an injury, whereby he is so disabled, is guilty of a felony.

“§ 208. A person who inflicts upon himself an injury, such as if inflicted upon another would constitute maiming, with the intent to avail himself of such injury, in order to excite sympathy, or to obtain alms, or any charitable relief, is guilty of a felony.

“§ 209. To constitute maiming, it is immaterial by what means or instrument, or in what manner the injury was inflicted.

“§ 210. Where it appears, upon a trial for maiming another person, that the person injured has, before the time of trial, so far recovered from the wound, that he is no longer by it disfigured in personal appearance, or disabled in any member or organ of his body, or affected in physical vigor, no conviction for maiming can be had ; but the defendant may be convicted of assault in any degree.” ED.

SUPREME COURT.

First Department—New York, 1875.

CUNNINGHAM V. THE PEOPLE.

The prisoner was indicted, tried and convicted, for forgery in the third degree. On the trial it was shown that the prisoner procured to be engraved in the city of New York blank warrants, purporting to be drawn by the auditor of public accounts of the State of Mississippi upon the State treasurer of that State, with a seal. The prisoner signed and filled in the blanks of two of the warrants and shipped them with a book of the blank warrants, with the seal, to Jackson, Mississippi, where the authorities of that State obtained possession of the package. The prisoner was arrested in New York, when he admitted his connection with the scheme. There was no impression of the seal upon the warrant, the subject of the indictment, and for the forging of which he was convicted. It appeared upon the trial, that the warrant was invalid, by the law of the State of Mississippi, without a seal, and that it lacked vitality because it did not purport to be registered. The Recorder charged the jury that upon the indictment the prisoner could be convicted of forgery.

Held, that the rule established in this State, is, that if the instrument be invalid on its face, it cannot be the subject of forgery, because it has no legal tendency to effect a fraud. A statute authorizing an instrument not known to the common law, and so prescribing its form as to render any other form null, forgery cannot be committed by making a false statutory one—not following the statute—even though it is so like the genuine as to deceive most persons.

Wm. F. Howe, for the prisoner.

B. K. Phelps, for the people.

BRADY, J. The prisoner was tried and convicted for forging warrants purporting to be drawn by the auditor of public accounts of the State of Mississippi upon the State treasurer of that State. The evidence established the facts that he procured them to be engraved and printed, and a seal also to be made, and that the work was done in this city. It also appears that he filled in the blanks of two warrants, and shipped or sent the books containing all the warrants signed and unsigned together with the seal, to Jackson, Mississippi, where the package fell into the hands of the authorities. It also appears that he confessed his connec-

tion with the scheme upon his arrest, but there is no proof other than the transmission of the drafts or warrants to Jackson, of any attempt on his part to utter them. He had not filled up all the warrants, because, he said, he had not sufficient data to do so satisfactorily. There was no impression of the seal upon the warrant which was the subject of the indictment, and for the forging of which he was convicted. It appeared upon the trial that the warrant was invalid, by the law of the State of Mississippi, without a seal. It would also seem that it lacked vitality because it did not purport to be registered. This does not distinctly appear however, although it was so declared by the recorder before submitting the case to the jury.

The chief question presented on this appeal is, therefore, whether the instrument was one which, under our laws, could be the subject of an indictment for forgery. The rule established by the adjudication in this State, and after a thorough consideration of the question, is, that if the instrument be invalid on its face, it cannot be the subject of forgery, because it has no legal tendency to effect a fraud. (*People v. Shall*, 9 Cow., 778; *People v. Fitch*, 1 Wend., 198; *People v. Wilson*, 6 Johns., 320; *People v. Stearns*, 21 Wend., 409; *People v. Harrison*, 8 Barb., 560.) And, as these cases show, there are many English decisions to the same effect. Whether, for instance, a bond or other instrument is of a form to be valid, is a question of law; if, therefore, a statute authorizes an instrument not known to the common law, and so prescribes its form as to render any other form null, forgery cannot be committed by making a false statutory one, in a form not provided by statute, even though it is so like the genuine as to be liable to deceive most persons. (2 Bishop Cr. Law, § 538, and cases cited.) Hence the decision in *People v. Harrison*, that an indictment would not lie for forging a certificate of the acknowledgment of a deed, when the certificate did not state (and was therefore imperfect) that the grantor acknowledged the execution of the conveyance. Legal forgery cannot be made out by imputing a possible, or even actual, ignorance of the law to the person intended to be defrauded. However dark may be the moral hue of a transaction, courts of justice can only act upon the legal crime, upon criminal breaches of

perfect legal obligations. (*Per* COWEN, J., in *People v. Shall, supra.*) How clear soever the fraudulent purpose, unless the writing is sufficient to accomplish that purpose, it is not forgery, since, with a single exception, actions only, and not evil intentions, are punishable by the English law. (Hammond Digest, Forgery, ch. 1, § pl. 102.) The invalidity of the warrant upon its face, on which the case for the prosecution rested, judged by the principles stated, render it improper to convict the prisoner. The evidence on the subject of the locality in which the warrants were to be uttered if there be any evidence relating thereto, shows that they were to be circulated in the State of Mississippi, because they were all sent there; and if the general public of this country are not chargeable with knowledge of the law of each State, it is at least incumbent upon them, where the obligations of a State are in the market for barter, to examine them, and every prudent man would examine them, nay, investigate their origin and issue, to ascertain whether they were genuine and authorized by law. If, however, the rule, that the knowledge of the law of each State must be restricted to its residents, as suggested in this case, it cannot be applied until a criminal attempt upon the citizen of another State is shown to have been made, and under such circumstances that he could not shield or excuse himself from the consequences of his presumed knowledge of the law. This case presents no feature of that kind. There was, as suggested, no attempt to use the warrants in this State. The inference to be drawn from the *modus operandi* of the prisoner and associates is, that they selected the State of Mississippi for the circulation of the warrants, as the most likely territory for the success of the enterprise. The duty of reversing the judgment rendered in this case seems to be imperative, for the reasons assigned.

DANIELS, J., concurred.

Judgment reversed, and new trial ordered.

COURT OF APPEALS.

NEW YORK, 1876.

MURPHY V. THE PEOPLE.

The prisoner was tried and convicted, in the Oyer and Terminer, held in Rockland county, of the crime of murder in the first degree, in killing Matilda Hugus.

On the trial the witness Gamble, who was in the room when the shot was fired by the accused, which killed the deceased, testified on the part of the people that he was the defendant in three suits brought against him by the accused and his brother; that he had been several times to attend the trial of them, and that each time Mrs. Hugus, the deceased, had accompanied him; and that he knew what the suits were for. The district attorney then asked Gamble, "Tell the jury what they were for?" An objection was taken, by the counsel for the prisoner, and overruled by the court. The witness then stated that the suits were brought to set aside deeds from his wife, the sister of the accused, to him. The wife of the witness was dead, and it was shown that the suits were set down for trial on the Monday after the murder.

Held, that it was clearly competent for the people to show that a litigation was pending between the prisoner and Gamble, and also the nature of the litigation, as bearing upon the existence of a motive on the part of the prisoner to commit the murder. It was left uncertain whether the design of the guilty party was to kill the deceased or Gamble. Both were in a position to be reached by the discharge of the gun or pistol, although it proved fatal only to Mrs. Hugus. The strength of the motive might depend upon the nature of the controversy and the extent of the pecuniary interests involved.

The objection is now taken that parol evidence cannot be given of the object of the suits, and that the pleadings were the best evidence of the issues in the actions.

Held, that as no objection of this kind was taken on the trial, it is not now available.

On the trial Pinkerton, a witness, was examined and in answer to the question as to what the measurements taken by him were, answered "I measured from the outside of the flower bed where the man stood," and then upon objection being made, said, "from where the footprints were up to the window, where the shot went in, was five feet three and-a-half inches, inside two feet eleven inches. I had a man sit in a chair, and measured from the floor to the top of his head." Prisoner's counsel moved that the first part of the answer be stricken out, on the ground that there was no proof, that the witness knew where the man stood, and that the last sentence of the answer be stricken out on the ground that the testimony was irrelevant. The motion was denied and an exception taken.

Held, that the denial of the motion was not error. The first part of the answer

assumed that the man by whom the footprints were made, stood at that place, but on objection being made the witness changed the form of the answer. The measurement of two feet and eleven inches, was the distance from the floor to the window, and had no reference to the measurement in question.

A witness who was sworn on the part of the people, testified in relation to the conversation between the prisoner and Pinkerton, at the sheriff's office, under objection.

Held, that the general rule applicable as well in criminal as civil cases is, that the declaration of a party, in respect to the subject-matter under investigation, whenever made, are admissible against him. This is qualified by the exception to the rule that, whenever the declarations of a person charged with crime are not voluntary within the legal meaning of that term, they are not competent and cannot be admitted in evidence. In this case it appeared that the declarations of the prisoner narrated were reduced to writing at the expressed desire of the accused, therefore there is no ground for the suggestion that the statement was not voluntary.

It was shown by the people, that on the evening of the murder and after it was committed, a mask was found under the window where the shot was fired, and during the conversation with Pinkerton, before alluded to, the prisoner was asked by one Schute "where did that mask come from?" He answered, "the children got that from the ragamuffins," and immediately added, as if recollecting himself (so the witness stated), "that mask had a black nose, and was torn down the face." The counsel for the prisoner moved to strike out the testimony as to the mask, on the ground that the mask had not been connected with the prisoner. The motion was denied.

Held, that the decision on the motion was correct. The fact that a mask had been found had not been communicated to the prisoner when the conversation occurred. His reply to the question indicated that he had knowledge that a mask was in some way connected with the transaction. It was proper to be shown as tending to connect the prisoner with the mask found on the night of the murder.

Henry Daily, Jr., and *James Emmett*, for the prisoner.

Seth B. Cole, district attorney, for the people.

ANDREWS, J. The plaintiff in error was convicted at the Court of Oyer and Terminer, held in Rockland county, in October, 1874, of the murder of one Matilda Hugus. The murder was committed on the evening of April 19, 1874, by means of a gun or pistol shot, fired, as the evidence tended to show, by some person standing outside of a house in the town of Clarkstown in Rockland county, in which the deceased and one Robert J. Gamble, a brother-in-law of the prisoner resided, and near a window of a room in which they were sitting when the shot was fired. The contents of

the gun or pistol passed through a pane of glass in the direction of the deceased and Gamble. Two of the shot with which the weapon was loaded penetrated the brain of the deceased and caused her death in a short time thereafter, and several lodged in and about the face and head of Gamble, causing severe hemorrhage, but no permanent injury. The room was not large. The deceased sat nearest the window, and in the wall opposite the window, and in a line with the places occupied by the deceased and Gamble, shot were found, and also the mark of a slug which passed through the plastering and fell between the studs of the partition wall. There was a servant girl sitting at the time in another part of the room, who was uninjured. The murder was committed about eight o'clock on Sunday evening. The prisoner resided in Jersey City, about thirty miles distant. He was arrested with his brother, Thomas Murphy, at Jersey City, on the next day, and on Tuesday morning was taken to the city of New York by one Pinkerton, a detective, and was there rearrested on a warrant issued by a magistrate of Rockland county, and taken by Pinkerton to that county and lodged in jail. The same evening he was brought into the sheriff's office, which was in the same building with the jail, and in the presence of Pinkerton and several other persons made a statement, which Pinkerton reduced to writing, but which was not signed by the prisoner, giving an account of the place where he was, what he did, and the persons he saw on the day of the murder. There were several exceptions taken on the trial to the admission of evidence, which are relied upon for a reversal of the conviction. No exception was taken to the charge.

The exceptions will be noticed in the order in which they are presented by the prisoner's counsel.

Gamble was produced as a witness for the people, and testified, among other things, that he was the defendant in three suits commenced in 1868, brought by the Murphys against him, and others, which were then pending, and that he had been several times to attend to the trial of them, and that Mrs. Hugus, the deceased, had accompanied him, and that he knew what the suits were for. The district attorney then proceeded: "Tell the jury what they were for." The

prisoner's counsel objected to the question, and the court overruled the objection and allowed the witness to answer. The witness then stated that the suits were brought to set aside deeds from his wife, the sister of the plaintiff, to him. The wife of the witness was then dead, and it appeared that the suits were set down for trial on the Monday after the murder. It was clearly competent for the people to show that a litigation was pending between the prisoner and Gamble, and also the nature of the litigation, as bearing upon the existence of a motive on the part of the prisoner to commit the murder.

The case made against the prisoner rested upon circumstantial evidence, and it was an important element in the case to show that circumstances existed which might operate upon him as a motive for the commission of the crime. It was left uncertain whether the design of the guilty party was to kill the deceased or Gamble. Both were in a position to be reached by the discharge of the gun or pistol, although it proved fatal only to Mrs. Hugus. It is always competent on a trial of this character to show the relations between the prisoner and the person against whom the murderous act was directed. The jury may have believed that it was committed in this case either from resentment against Gamble, or for the purpose of preventing the deceased from appearing as a witness in the pending litigation. The strength of the motive might depend upon the nature of the controversy and the extent of the pecuniary interests involved in it, and it was, for this reason, proper to show the character as well as the existence of the litigation. The jury were entitled to the fact proved to aid them in determining whether the prisoner had any motive for the commission of the crime, for it was for them to determine what weight should be given to it in the final determination of the case. The only objection which could be taken to the proof was to the form, and not to the substance, and it is now claimed that parol evidence could not be given of the object of the suits, and that the pleadings were the best evidence of the issues in the actions, and should have been produced. But no objection of this kind was taken. The objection was general, and no ground of objection was specified. If objection had been taken to the mode of proving

the facts, other proof might have been given, and the objection have been obviated. In the absence of an objection of this kind, it must be assumed that the question intended to be raised by the objection made was as to the competency of proof of the fact to which the question related, and not to the mode of proving it.

We should be disinclined to overlook a substantial error in the admission of testimony in a capital case, although the objection was not technically correct, but it can hardly be supposed that if the fact sworn to was untrue, or the real fact as to the character of the litigation, if disclosed, would have been more favorable to the prisoner, it would not have been shown by the defendant. The authorities on the general proposition that the objection now taken should have been specifically made on the trial, in order to be available on error, are decisive. (*Willard v. Warren*, 17 Wend., 257; *Cowperthwaite v. Sheffield*, 3 N. Y., 243; *Mabbett v. White*, 12 id., 442; *Walsh v. Washington Ins. Co.*, 32 id., 440; *Atkins v. Elwell*, 45 id., 753; *Height v. The People*, 50 id., 392.)

The witness, Pinkerton, testified that he had examined the premises where the deceased was killed, on the morning of the day when he was sworn as a witness, and made certain measurements. The imprint of a footprint was found on the night of the murder on a flower bed near and under the window through which the shot was fired, and evidence was given that it corresponded in size with a boot found in the prisoner's house on the following day. The witness, in reply to a question as to what the measurements taken by him were, commenced his answer by stating: "I measured from the outside of the flower bed where the man stood," and then an objection being made said, "from where the footprints were up to the window, where the shot went in, was five feet three and a-half inches, inside two feet eleven inches. I had a man sit in a chair, and measured from the floor to the top of his head." The prisoner's counsel then made a motion that the first part of the answer be stricken out, on the ground that there was no proof that the witness knew where the man stood, and that the last sentence be stricken out on the ground that the testimony was irrele-

vant. The motion was denied, and the prisoner's counsel excepted. The exception was not well taken.

The part of the answer which assumed that the man by whom the footprint was made stood at that place, if objectionable, was at once corrected by the witness on objection being made by his changing the form of the answer, and giving the measurement from the place where the footprints were, without reference to the fact whether the person by whom they were made stood at that point. The measurement made, with reference to a man sitting in a chair placed where the deceased or Gamble was supposed to have been, was not given by the witness, and the fact that he made such a measurement, which was the only fact to which he testified, was of no possible consequence. The measurement of two feet and eleven inches, as is evident from the testimony of the witness Krender, who assisted in making it, was the distance from the floor to the window, and had no reference to the measurement in question. The judge was, under these circumstances, justified in denying the prisoner's motion.

A witness who was present at the conversation between the prisoner and Pinkerton in the sheriff's office after the arrest, was allowed, under objection taken by the prisoner's counsel, to state the conversation. It is claimed that the statement there made by the prisoner could not be given in evidence.

The general rule applicable as well in criminal as civil cases is, that the declarations of a party, in respect to the subject-matter under investigation, whenever made, are admissible in evidence against him. If, however, it appears that the declarations made by a person charged with crime were not voluntary in the legal meaning of that term, they were incompetent and cannot be admitted. The circumstances under which the declarations in question were made, were shown by the prosecution before they were offered in evidence. These circumstances, as narrated by the witnesses for the people, were, in some respects, controverted by the testimony of the prisoner when he was subsequently sworn, but the admissibility of the evidence of the declarations, is to be determined by the facts appearing when it was offered. It then appeared that the prisoner, when brought to the

sheriff's office, was asked by Pinkerton if he desired to make any statement of his "whereabouts on Sunday and Saturday," and was informed by Pinkerton that if he desired to do so, he would reduce the statement to writing for him, and the prisoner replied that he did, and he then proceeded, without any request being made at any time that he should do so, to make the narration which was given in evidence. Upon this proof there is no ground for the suggestion that the statement was not voluntary. It was not made under the influence of threats or promises, or upon his examination on a judicial investigation touching the cause of the death of Mr. Hugus, or the prisoner's connection with it. No authority has been referred to which holds that a statement made under these circumstances is inadmissible. The prisoner was at the time under arrest upon the charge of having committed the murder, and the statement was made to the officer in whose actual custody he had been up to the time that he was brought to the jail. But a statement made by a prisoner is not involuntary because made after his arrest, to the officer who arrested him, and although made while in his actual custody. (*People v. Rogers*, 18 N. Y., 9; *People v. Wentz*, 37 N. Y., 303.) The rule in respect to the admissibility of confessions or declarations made by a prisoner, and under what circumstances they will be excluded as involuntary, was considered by this court in the cases of *Hendrickson v. The People* (10 N. Y., 13); *The People v. McMahon* (15 id., 384); and *Teachout v. People* (41 id., 9). It is sufficient to say that they do not sustain the objection which is here made, or conflict with the decisions in *The People v. Rogers* and *The People v. Wentz*. The principle that proof of confessions is to be carefully scrutinized, is to be applied by the jury, and they are to determine the weight to be given them, taking into consideration the circumstances under which they were made. We are of opinion that the statement made by the prisoner to Pinkerton was properly admitted.

After the murder, and on the same evening, a mask was found under the window where the shot was fired. During the conversation of the prisoner with Pinkerton, before alluded to, the prisoner was asked by one Schute, "where did that mask come from?" He answered, "the children got that from

the ragamuffins," and immediately added, as if recollecting himself (so the witness stated), "that mask had a black nose, and was torn down the face." The prisoner's counsel then moved that the testimony as to the mask be stricken out "as not having been connected with the prisoner," and the motion was denied. The fact that a mask had been found had not been communicated to the prisoner when the conversation occurred. His reply to the question of Schute indicated that he had knowledge that a mask was in some way connected with the transaction. This conversation was proper to be shown as tending to connect the prisoner with the mask found on the night of the murder.

We have noticed all the exceptions urged upon our attention by the counsel for the prisoner, and we find no error of law in the rulings upon the trial.

The judgment should, therefore, be affirmed.

All concur.

Judgment affirmed.

SUPREME COURT.

First Department—New York, 1875.

HARRIS V. THE PEOPLE.

The accused was convicted of perjury, in the Court of General Sessions of New York, and sentenced to ten years imprisonment in the State prison. The perjury alleged in the indictment was committed before George H. Sheldon, fire marshal of the city of New York. The accused swore, on his examination before said marshal that, at the time of the fire, he was not in the city of New York, but was in the city of Troy. The accused also swore, on this examination, that at the time of the fire, there was in the building in which the fire occurred, a stock belonging to him and his copartner, consisting of 65,000 cigars, 185,000 cigarettes, 400 pounds of Havana tobacco, of the value of one dollar and fifty cents per pound, 645 pounds of Virginia tobacco, of the value of sixty-five cents per pound; and that he and his partner sustained a loss by the fire, of between five and six thousand dollars.

The indictment contained two counts. The first, alleging perjury in the prisoner's testimony before the fire marshal, the second, alleging perjury in swearing to an affidavit before the same officer, containing in substance the same allegations.

The accused was convicted upon the second count.

It was objected to on the trial that the law authorizing the fire marshal to administer oaths had been repealed, therefore no testimony in support of the allegations in the indictment should be received.

Held, that the objection was not tenable. The act of 1868, created the office of fire marshal, gave him power, in certain cases, to administer oaths, and enacted that false swearing before him, should be deemed perjury, and punishable as such. The acts of 1870, and 1871, and the city charter of 1873, did not take from the fire marshal the power conferred upon him by the act of 1868. It is very clear, therefore, that, for any false swearing as to any matter legitimately within the sphere of the marshal's powers, an indictment may be had, and a conviction secured on competent evidence.

Held, that when the oath is set out "in substance and to the effect following" a literal copy is not required. It is not necessary to set forth the affidavit, etc., on which perjury is assigned verbatim.

Ira Shafer, for the prisoner.

Benjamin K. Phelps, for the people.

BRADY, J.: The plaintiff in error was convicted of perjury, at the December term of the General Sessions, 1873, and sentenced to ten years imprisonment in the State prison. The perjury alleged in the indictment, was committed on the 13th day of September, 1873, before George H. Sheldon, fire marshal of the city of New York, who was investigating the cause, origin and circumstances of a fire which occurred on the 5th of September, 1873, at No. 10 Hester street, in a building occupied by the plaintiff in error and his copartner, as a tobacco manufactory. This investigation was entered upon by the fire marshal, in pursuance of the duty and authority imposed upon him by chapter 563, of the Laws of 1868, and the several acts supplementary thereto. The plaintiff in error swore, on this examination, that, at the time of the fire, he was not in the city of New York, but was in the city of Troy. He also swore, that, at the time of the fire, there was in the building in which the fire occurred, a stock belonging to him and his copartner, consisting of 65,000 cigars, 185,000 cigarettes, 400 pounds of Havana tobacco, of the value of one dollar and fifty cents per pound, 645 pounds of Virginia tobacco, of the value of sixty-five cents per pound; and that he and his partner sustained a loss by the fire, of between five and six thousand dollars.

The indictment contains two counts, one alleging perjury in the oral testimony given before the fire marshal, and

the other alleging perjury in swearing to an affidavit before the same officer, containing in substance the same allegations. The plaintiff in error was convicted upon the second count of the indictment. On the trial, evidence was given in relation to the merchandise upon the premises, on behalf of the people. It is claimed by the people that the evidence shows that the fire was designed, and for the purpose of making a false claim against the insurance company, although that is not important in regard to the accusation of which the plaintiff in error was convicted. The first objection taken on the trial, was to any testimony being given in support of the indictment, on the ground that the act of May 4th, 1868 (Laws 1868, chap. 563, p. 1168, vol. 2), creating the office of metropolitan fire marshal, giving him power to administer oaths, and condemning false swearing in any proceeding before him, had been repealed. This objection is not tenable.

1. The act of May 4, 1868 (2 Rev. Stat. [5th ed.], 990), has not been repealed. The Revised Statutes gave to the chief of police authority to investigate the origin of fires. (*Supra.*) The act of May 4, 1868, created the office of metropolitan fire marshal, and made it his duty (sec. 2) to "examine into the cause, circumstances and origin of fires (occurring in those portions of the metropolitan police district in which regular patrolmen of metropolitan police are authorized and appointed), by which any building, vessels, vehicles, or valuable personal property shall be accidentally or unlawfully burned, destroyed, lost or damaged, wholly or partially; and to especially inquire and examine whether the fire was the result of carelessness or the act of an incendiary. The metropolitan fire marshal shall take the testimony on oath, of all persons supposed to be cognizant of any facts, or to have means of knowledge in relation to the matters herein required to be examined and inquired into, and cause the same to be reduced to writing," etc. The third section of the act gives him "power to issue a notice, in the nature of a subpoena * * * to compel the attendance of any person as a witness before him, to testify in relation to any matter which is, by the provisions of this act, subject of inquiry and investigation by the said marshal;" "to administer and verify oaths and affirmations to

persons appearing as witnesses before him ; and false swearing, in any matter or proceeding aforesaid, shall be deemed perjury, and shall be punishable as such."

This act was followed by the act of April 26, 1870 (chap. 383), which was amendatory of an act passed in the same year (chap. 137, § 44), and is as follows: "Section 44. * * * The board of police shall have power to appoint a fire marshal, chief clerk, and assistant clerk, who shall hold office during the pleasure of the board, and such board, marshal, and clerks, shall have the like powers, and perform the like duties, as those provided by chapter 563, of the Laws of 1868, so far as they are applicable to the city of New York ; and the compensation of such marshal and clerk shall be the same as now fixed in and by said acts." (Section 21.)

The chapter of 1873 (Laws 1873, p. 504), gave the appointment of the fire marshal to the fire commissioners, but conferred upon the marshal (sec. 76) all the powers and imposed upon him all the duties, given and imposed by the previous statutes relating to that office.

The act of 1871 (Laws, p. 1277, chap. 584), did not, in any way, limit the powers and duties of the marshal. By section 4, it invested him with the same powers conferred by the act of 1868 (*supra*), and also the same powers conferred upon the superintendent of police of the city of New York, by the Revised Statutes. The marshal, by these acts, was authorized to examine into the cause, circumstances and origin of fires, by which any building, vessels, vehicles, or any valuable personal property should be accidentally or purposely destroyed, lost or damaged, wholly or partially; and especially to take the testimony on oath of all persons supposed to be cognizant of any facts, or to have means of knowledge in relation to the matters therein required to be examined and inquired into; also to compel the attendance of witnesses, and to administer oaths and affirmations to persons appearing as witnesses before him. It is very clear, therefore, that, for any false swearing as to any matter legitimately within the sphere of the marshal's powers, an indictment may be had, and a conviction secured on competent evidence. The further objection, that there was no legal proof that the witness, Mr. Sheldon the fire marshal, was the officer referred to in the indictment, is equally unavail-

able. He testified, without objection, that he was then, and had been fire marshal from the twenty-first of May preceding his examination; and on cross-examination stated by whom appointed, and the manner of his appointment. The indictment, as already suggested, was predicated of the oral testimony of the plaintiff in error, and his affidavit signed by him and sworn to before the fire marshal. Two counts were employed to develop both phases of the offence. It is, perhaps, unnecessary to cite authorities to show this to be an authorized mode of pleading. It may be said, however, that though a defendant cannot be charged with different felonies in different counts, yet he may be charged with the *same felony*, in different ways, in several counts, to meet the facts of the case (Barbour's Cr. Pr., 340, and cases cited.) The case herein was precisely the same, but charged in different ways. The plaintiff in error was charged with having sworn falsely in his affidavit, of and concerning several necessary and material matters contained therein, "in substance and effect following, that is to say," etc. One of the matters stated, as alleged, was that there were on the premises 60,000 cigars; whereas, by the affidavit, when it was produced, the statement made was, that there were 65,000 cigars; and in this respect there was a variance between the proof and the charge. The plaintiff in error urges this as a fatal error; but he is mistaken. When the oath is set out "in substance and to the effect following," a literal copy is not required. It is not necessary to set forth the affidavit, etc., on which perjury is assigned verbatim. (*The People v. Warner*, 5 Wend., 271.) "To my apprehension," said MARCY, J., "the substance and effect of an instrument in writing cannot, either in common parlance or legal import, be understood to mean an exact copy of it." No apprehension could be reasonably entertained, that the plaintiff in error, being convicted of the offence charged upon the paper, could be convicted a second time for the same offence. The evidence is clearly a clerical error. These views dispose of the objections to the authority of the fire marshal, to the admissibility of the affidavit on account of the alleged variance, and to the legality of the conviction under one of the counts. There remains to be considered, however, the propriety of investigating the question, as to the value of the

property as stated in the affidavit, to which objection was made, and of which it seems to have been claimed perjury could not be assigned. It is true that the value of the property, in the abstract, is not at all material to the question of how the fire originated, but when the inquiry is extended, and the examination embraces not only that subject but another, namely, whether it was the result of carelessness or the act of an incendiary, it may become material to know whether any misrepresentation has been made in reference to the property assumed or said to be destroyed, and, if yea, whether it furnished a motive which might influence one to become an incendiary, whoever he might be. The complaint against the plaintiff in error was twofold; that he had sworn he was absent from this city when the fire took place, when he was not in fact absent; and, secondly, that he had falsely augmented the value of the property on his premises at the time of the fire. In seeking the origin and circumstances of the fire, and with a suspicion against the plaintiff in error, his asserted value of the property, if enhanced beyond its true value, was an important and material element, and one necessarily embraced legitimately within the inquiry established. It was not erroneous, therefore, either to admit the evidence on the question of value, or submit the issue created by it to the jury. The testimony in reference to the absence of the plaintiff in error from the city, was strong on his behalf, it would seem from the appeal book, but we cannot say that it was sufficient to overcome the testimony given on behalf of the people. The design of the statute, in creating a fire marshal, and investing him with broad and ample powers, was to detect and punish the crime of arson, which, without that officer, might not be discovered; and, therefore, the legislature made false swearing before him perjury, if it related to any subject legally within its authority. The facts and circumstances which would tend to show the act of firing, might in many instances become valuable in demonstrating the perjury committed, particularly those bearing on the existence of motive, which is always coupled with design.

The judgment must be affirmed.

DAVIS, P. J., and DANIELS, J., concurred.

Judgment affirmed.

SUPREME COURT.**Third Department—New York, 1875.**

PEOPLE V. CHRISTOPHER.**Memorandum.**

WRIT of error to the Court of Sessions in and for the county of Tompkins.

The defendant was tried, convicted and sentenced to the State prison, in said Court of Sessions, for the crime of perjury. The perjury was alleged to have been committed in the verification of an answer interposed in an action brought upon two promissory notes made by defendant. The complaint averred the making of the notes and their transfer to the bank [the plaintiff]; its ownership; their presentment and demand for payment when the same became due; their non-payment; and that part of said notes had been paid.

The answer to said complaint was as follows: First. The defendant, Daniel Christopher, comes into court by John A. Williams, his attorney, and in answer to the plaintiffs' complaint says that he denies each and every allegation therein alleged, except as herein admitted as follows, that is to say: He admits that he, on or about June 18th, 1870, made his promissory note for \$850, payable at First National Bank, Ithaca, to the order of R. DeWitt Mann, and that the same was indorsed by R. DeWitt Mann and A. C. Ditmar; that the plaintiffs are a banking corporation and discounted said note at or about the day of its date, and paid this defendant, the then holder thereof, the sum of \$500, and no more, and that no further or other sum has ever been paid by the plaintiff for or on account of said note. Second. The defendant says that he admits the execution of the second note described in the said plaintiffs' complaint for the sum of \$1,000, made July 19th, 1870, to the order of A. C. Ditmar and indorsed by said Ditmar and R. DeWitt Mann, payable at the First National Bank of Ithaca and delivered to said plaintiffs. And this defendant, in further answer to said complaint, says that the said last described note is fully paid and satisfied, and should be delivered up to him to be canceled. The verification was that the same was "true of his own knowledge, except as to those matters therein stated to be upon his information, and as to such matters he believes it to be true."

In the indictment perjury is first assigned on the admission con-

tained in the answer — upon the words that the plaintiff discounted said \$850 note, “*and paid this defendant, the then holder thereof, the sum of \$500, and no more*, and that no further or other sum had ever been paid by the plaintiff for or on account of said note ;” and *secondly*, upon the words in the *second* count of the answer, “that the said last described note [the \$1,000 note] is fully paid and satisfied.” On the question whether perjury could be assigned upon the verification of the answer, JAMES, J., *held*, that in all cases the assignment of perjury, on which a conviction is asked, must be of matter material to the issue to be tried, and that materiality is always a question of law ; that the words in the first count designated as untrue contained no answer to the complaint ; were not responsive to any allegation therein ; did not help to form any issue ; were not a denial, but simply a statement of what defendant admitted, and hence were wholly immaterial ; that no issue was formed to the first count of the complaint ; that the answer contained no denial, as the defendant only *said* he denied what he did not admit, and that this was a new affirmation that he denied. Merely saying he denied was one thing ; a direct and positive denial was quite another. (*Arthur v. Brooks*, 14 Barb., 533 ; *Blake v. Eldred*, 18 How., 240.)

That by the second count the answer contained a separate and distinct allegation that the \$1,000 had been paid ; formed a direct issue with an allegation in the complaint upon a material point ; and that the word “*says*” was not there used as an assertion of what defendant had done or was about to do, but was the assertion of a fact which, if true, constituted a defence to the note ; that the allegation was therefore material, and perjury could be assigned thereon.

That as a general verdict of guilty was rendered in the case, the evidence given upon the trial could be properly applied to said second count, and hence the conviction could be sustained.

LEARNED, P. J., concurred in the result, without being confident that perjury might not be committed when the allegation of an answer is “the defendant says that he denies.”

Opinions by LEARNED, P. J., and JAMES, J.

Present — LEARNED, P. J., and JAMES, J.

COURT OF APPEALS.

NEW YORK, 1876.

McCOURT V. THE PEOPLE.

The accused was indicted for the crime of burglary and larceny. The indictment contained three counts: Burglary in the second degree; burglary in the third degree and larceny. It was charged that the prisoner entered the house of one Hinckley Cole with the intent to commit a crime; to wit, the crime of larceny. The intent alleged was to steal cider.

The jury rendered a general verdict of guilty.

The facts proved upon the trial were as follows: The accused with his brother and another person, stopped at the house of the prosecutor, who was absent from home. The accused was, at the time, partially intoxicated. He had before stopped at the same house and procured cider. The daughter of the prosecutor came to the door, and when the accused asked for cider and offered to pay for it, she refused to let him have any. The prisoner said he would have some cider anyway, and started to go down cellar. The daughter forbade him, and ordered him to leave the premises, but he went into the cellar and drew some cider in a pail. The brother of the accused followed him into the cellar, took the cider from him and got him away from the premises. There were two doors to the cellar, one opening out of and the other opening into the cellar. The evidence on the part of the prosecution was, that the door opening into the cellar was shut and latched. The prisoner's counsel asked the court to direct an acquittal, which request was refused.

Held, that if the prisoner unlatched the cellar door on entering, there was a breaking and entry which would constitute one element of burglary.

Held, that the material question in the case is, whether the evidence justified the finding of the jury that the prisoner broke and entered the cellar with intent to steal cider therein. If the evidence was insufficient to show that it was done with intent to commit a larceny, the judge should have directed an acquittal. There must have been a felonious intent, for without it there was no crime.

Held, further, that in this case there was neither fraud, stratagem or stealth; the whole transaction was open, in the day-time, and in the presence or within the observation and knowledge of the prosecutor's daughter. To find the transaction a larceny it is necessary to override the ordinary presumption of innocence and to reject a construction of the prisoner's conduct which accounts for all the circumstances proved without imputing crime, and to impute a criminal intention, in the absence of the ear-marks which ordinarily attend and characterize it.

Samuel Hand, for the accused.

Nathaniel C. Moak, for the people.

ANDREWS, J. There was evidence authorizing the submission to the jury of the question whether the prisoner gained admission to the cellar by opening the door from the cellar-way. This door was an outer door of the house. The fact that there was another door opening outwardly before reaching it, did not make it an inner door of the house. Like a storm-door, the outer door was a barrier to the approach to the outer door of the house, and access to the house could not be obtained until the second door was opened. If, therefore, the prisoner in entering the cellar unlatched the door immediately communicating with it, there was a breaking and entry which would constitute burglary, provided the other constituent of the offence was made out, viz., that the prisoner entered with the intent to commit a crime. (2 R. S., 668, §§ 13, 18.)

The material question in the case is, whether the evidence justified the finding of the jury that the prisoner broke and entered the cellar with intent to steal cider therein; which is the intent charged in the indictment. The breaking and entry was not a substantive offence; and if the evidence was insufficient to show that it was done with intent to commit a larceny, the judge should have directed an acquittal. Every taking by one person of the personal property of another without his consent, is not larceny; and this, although it was taken without right, or claim of right, and for the purpose of appropriating it to the use of the taker. Superadded to this, there must have been a felonious intent, for without it there was no crime. It would, in the absence of such an intent, be a bare trespass, which, however aggravated, would not be crime. It is the criminal mind and purpose going with the act which distinguishes a criminal trespass from a mere civil injury. (1 Hale's P. C., 509.)

Whether the criminal intent existed in the mind of a person accused of crime at the time of the commission of the alleged criminal act, must of necessity be inferred and found from other facts which in their nature are the subject of specific proof; and for this reason it is, that the other constituents of the crime being proved, it must, ordinarily, be left to the jury to determine, from all the circumstances, whether the criminal intent existed.

In some cases the inference is irresistible, and in others it

may be, and often is, a matter of great difficulty to determine whether the accused committed the act charged with a criminal purpose. But these are usually found in connection with an act done, which is charged to be criminal, attending circumstances which characterize it, and if these are absent, or the circumstances proved are consistent with innocence, a conviction cannot be safely allowed.

In this case the accused entered the cellar without right and against the protest of the prosecutor's daughter, with intent to obtain a drink of cider, and in that way to appropriate it to his own use and deprive the prosecutor of his property. So, if in passing through the prosecutor's orchard he had, without the consent and against the will of the owner, picked from the ground an apple and eaten it, the act would meet the general definition of larceny, to wit, a taking of the personal property of another, without his consent, and appropriating it to his own use with design to deprive the owner of it. Larceny might be predicated of such a transaction, but if it appeared the act was done openly, in the day-time, in the sight of the owner, a jury would not be called upon to convict; and the court might properly so advise them and direct an acquittal. In the case supposed the act would be a plain trespass, and the circumstances proved would be consistent with a design on the part of the accused to commit a trespass, and there would be an absence of circumstances usually accompanying a felonious taking.

In the case before us the accused was guilty of a rude and aggravated trespass. He persisted in entering the cellar to draw cider although forbidden to do so by the prosecutor's daughter. He offered to pay for it if she would furnish it. He had procured cider at this house before, and he was partially intoxicated. But these circumstances were no justification of his act; the daughter had a right to refuse to give him cider, and his offer to pay for it gave him no right to take it by force; and his intoxication, while it may to some extent account for his conduct, did not mitigate his offence or excuse his crime, if one was committed. But there was an absence of the circumstances which ordinarily attend the commission of larceny and which distinguish it from a mere trespass. There was neither fraud, stratagem or stealth.

The value of the cider which he intended to take was trivial, and the whole transaction was open, in the day-time, and in the presence or within the observation and knowledge of the prosecutor's daughter. The people gave in evidence the declaration of the accused, made to the prosecutor a short time after the transaction, on the occasion of the settlement of the civil damages, in answer to an inquiry, what his object was in so conducting himself at the house, that he was "rum crazy;" and this was very likely the truth. There was not only an absence of the usual *indicia* of a felonious taking, but all the circumstances proved are consistent with the view that the transaction was a trespass merely. To find this transaction a larceny it is necessary to override the ordinary presumption of innocence and to reject a construction of the prisoner's conduct, which accounts for all the circumstances proved without imputing crime, and to impute a criminal intention, in the absence of the ear-marks which ordinarily attend and characterize it. The accused was convicted of burglary and larceny and was sentenced to two years in the State prison. There was not, we think, sufficient evidence to warrant the conviction, in that it did not justify an inference that the accused acted with a felonious intent.

We cannot sustain the conviction without confounding the distinction between criminal acts and such as, however reprehensible, involve only a violation of private rights, and injuries for which there is a remedy only by civil action.

The refusal of the court to direct an acquittal was error, for which the conviction should be reversed.

All concur.

Judgment reversed.

SUPREME COURT.

First Department—New York, 1875.

WEYMAN V. THE PEOPLE.

The accused was tried upon an indictment for grand larceny, convicted, and sentenced to imprisonment for five years.

The prisoner was a jeweler in New York city, and sent, what was known as a memorandum order, to Charles Kuhn & Co., engaged in the same business, for six pairs of gold band bracelets, which were sent to him on that order, by said firm. The order was designed and understood to be an application for the articles mentioned in it, for the purpose of showing them to a customer to select from, who, if he accepted either, the price for that article, with the remainder of the articles, should be returned to the firm filling the order. Neither the articles sent on the order, nor the money for either of them were returned by the accused.

Held, that the title to the property sent upon the order did not pass from the firm of Kuhn & Company to the accused under this arrangement. So long as no sale was made it was not the design of the parties that the title should pass. The prisoner was a mere custodian of the property for the persons sending it to him; and if he acquired that feloniously, for the purpose of depriving the owners of it by means of the artifice he made use of, that was sufficient to constitute the crime of larceny. The felonious acquisition was a question for the jury.

Held, that the distinction between this class of cases, and obtaining money by means of false pretences, consists in the circumstance that in the latter the owner intends to part with his title with the change of custody, while in the former no intention of that kind exists.

On the trial the prosecution was allowed to show, under objection, that the prisoner obtained these articles from the complainants, in the same manner they had procured other articles of jewelry from other parties, appropriating the same to his own use, for the purpose of establishing the felonious intent in obtaining those mentioned in the indictment.

Held, that the intent is the vital fact to be ascertained; and proof of other acts, plainly within one common purpose and design, are received to show the felonious intent.

W. F. Kintzing, for the prisoner.

Horace Russell, for the people.

DANIELS, J.: It appeared, upon the trial, that the prisoner, on the 24th of November, 1874, sent what was known as a memorandum order, to Charles Kuhn & Co., jewelers, carrying on business at No. 18 John street, in the city of

New York, for six gold band bracelets, which were thereupon sent to him by that firm. The prisoner was engaged in the same business and, in its transactions, the order was designed and understood to be an application for the articles mentioned in it, for the purpose of showing them to a customer, and enabling him to inspect them and select out of the number sent, which, if either, he would take, and, if he accepted either, that the money for that, with the remainder of the articles, should be returned to the persons sending them on the order. And the evidence tended very directly to show that such was the character of this transaction between the prisoner and Kuhn & Co. But neither the articles sent to him, nor the money for either of them were at any time returned by him.

Upon these facts it was objected by the prisoner's counsel that he could not be convicted of larceny, because, upon the delivery of the articles, both the title to them, and their possession, passed to him. But this position cannot be maintained, for the title certainly did not pass. The property, under the arrangement, remained in Kuhn & Company in all the articles not sold by the prisoner. He had the power to sell and transfer the title to such of the articles as he might dispose of in that manner. But until a sale was made, the title was in no respect changed. It was not its purpose, that the title in any event should pass to the prisoner. He was the mere custodian of the property for the persons sending it to him ; and if he acquired that feloniously, for the purpose of depriving the owners of it by means of the artifice he made use of to obtain it, that was sufficient within the rule sanctioned by the authorities, to constitute the crime of larceny. (Whart. Crim. Law [4th ed.], 1847-1852 ; *Hilderbrand v. People*, 8 S. C., 19 ; 56 N. Y., 394 ; *Smith v. People*, 53 id., 111.) Whether he did or not was a question for the jury under the evidence given in the case, and that was fairly submitted to them for their determination. The distinction between this class of cases, and obtaining property by means of false pretences, seems to consist in the circumstance, that in the latter the owner intends to part with his title with the change of custody, while in the former no intention of that kind exists.

The people were allowed to show that the prisoner, on the

same day following that on which he procured these articles from Kuhn & Company, in the same way and by similar means, procured other articles of jewelry from other persons, and appropriated them to his own use. This evidence was offered and received for the simple purpose of establishing his intent to be felonious in obtaining those mentioned in the indictment. His counsel excepted to the ruling under which it was admitted, and now relies upon the exception for the reversal of the conviction. By the evidence which was excepted to, it appeared that the prisoner, on the twenty-fourth of November, obtained from Smith & Hedges, jewelers in Maiden Lane, a set of diamond studs, worth \$500, on a representation that he had a customer for them; and on the next day, the twenty-fifth, procured from R. S. Middleton, another jeweler in the same street, two gold watches on a similar representation; all of which were to be returned by him unless they were purchased by the customers, and in that event, the money was to be returned instead of the article it might be received for. The three transactions occurred within two days, and the similarity in their leading features and characteristics, justified the conclusion that they were pervaded and controlled by the same general intention. It was one intent, manifested by three distinct acts. But that so far connected them as to render them all manifestations of the same purpose. It combined them in one felonious plan, each of which was but a portion of its execution. And the several acts were allowed to be shown, in order to enable the jury to determine what was the intention of the prisoner in the one which was the subject of the indictment. That was the gist of the crime it was charged he had committed, and, ordinarily, proof of its existence must depend upon the circumstances attending the transaction.

In other cases where the intention with which an act has been performed has been a material circumstance to be ascertained, evidence of this description has been received. Where goods have been obtained by means of fraudulent representations, it has been held that as the intent is a fact to be arrived at, it is competent to show that the party accused was engaged in other similar frauds about the same time; provided that the transactions are so connected as to time,

and so similar in their relations, that the same motive may reasonably be imputed to them all. (*Hall v. Naylor*, 18 N. Y., 588, 589; *Henneguin v. Naylor*, 24 id., 139; *Allison v. Matthieu*, 3 Johns., 235; *Rankin v. Blackwell*, 2 Johns. Cas., 198; *Bielschowsky v. People*, 10 S. C., 40; *Com. v. Eastman*, 1 Cush., 189.) The same thing is very common for the purpose of establishing guilty intent on trials for passing counterfeit money, and in other cases mentioned in section 15, volume 3, of Greenleaf on Evidence. In *Stuart v. Lovel* (2 Stark., 84), Lord ELLENBOROUGH declared that there was no doubt but that other libellous publications would be admissible in proof of the intent, on the trial of an indictment for a libel. And in *Reg. v. Dossett* (2 Car. & Kir., 306), on an indictment for feloniously setting fire to a rick of wheat straw, proof was allowed to show that it had been previously set on fire by the prisoner firing a gun very near to it. In that case Justice MAULE held, that in many cases it is an important question whether a thing was done accidentally or wilfully. If a person were charged with having wilfully poisoned another, and it were a question whether he knew a certain white powder to be poison, evidence would be admissible to show that he knew what the powder was, because he had administered it to another person who had died, although that might be proof of a distinct felony. In the cases of uttering forged bank notes, knowing them to be forged, the proofs of other utterings are received to show the intent, while all are distinct felonies. Several cases are added in a note to this decision, fully sustaining the principle mentioned by the court.

The case of *Reg. v. Richardson* (2 Fost. & Fin., 343), is still more analogous to the present one. The trial was for embezzlement, and evidence was offered of similar errors in the prisoner's account, before and after those forming the subject in the charges. This was objected on his part, but the proof was held to be proper, and it was received by the court.

And a decision quite similar was made on the trial of an indictment for the same offence, in the case of *Com. v. Tuckerman* (10 Gray, 173). The case of *Reg. v. Geering* (18 Law Jour. [M. C.], 215) went quite as far as the court did upon the trial of the prisoner. That was an indictment for

murder by means of arsenic ; and the prosecution proposed and was allowed to show, on the trial of the prisoner for poisoning her husband by arsenic given him in tea prepared by her, that arsenic had been taken into the stomach of three of her sons at other times ; that two of them had died of poison, and that the symptoms of all the four parties were the same ; that they all lived with the prisoner, and formed part of her family ; that she generally made the tea for them, cooked their victuals, and distributed the same to them on their leaving the house to go to their work in the morning. POLLOCK, C. B., held this evidence proper, and stated that ALDERSON and TALFOURD concurred with him. He added in his decision, that it was not inadmissible by reason of its having a tendency to prove a subsequent felony.

Noggs' Case (4 C. & P., 364) was disposed of under the same principle. The prisoner was indicted for administering arsenic to horses, and the prosecution was allowed to show, as evidence of his intent, that it had been done by him on other occasions. *Hinckworth's Case* was an indictment for robbery. The prisoner went with a mob to the prosecutor's house, and one of the mob went to him, and civilly, and, as he believed, with good intentions, advised him to give them something to get rid of them, which he did. To show that this was not *bona fide* advice, but simply a mode of robbing the prosecutor, evidence was received of other demands of money by the same mob, at other houses, at different periods of the same day, when some of the prisoners were present. And it was held by PARKE, J., to be proper, after a conference with VAUGHAN and ALDERSON, and in which Lord TENTERDEN concurred. Other cases of the same general tenor will be found in Roscoe's Criminal Evidence (5th Am. ed.), 81-83, 94, 95.

The evidence which was received by the court on the trial of the prisoner, seems to have been within the principle maintained by these authorities. If other criminal acts can be received, as they most certainly have been, with the sanction of the courts, for the purpose of proving the intent with which the act charged as criminal was committed, no good reason exists for excluding it in prosecutions for larceny. The intent is the vital fact to be ascertained ; and

other acts, plainly within one common purpose or design, have been allowed as legal evidence of it. In treason, murder, robbery, arson, embezzlement, fraud, receiving stolen goods (*Copperman v. People*, 8 S. C., 15; 66 N. Y., 591), and other cases, such acts, as proof of intent, have been received, and no reason appears why larceny should not be included in the same principle. The prisoner's counsel insists that it was a violation of the rule precluding the prosecution from proof of bad character, when no evidence on that subject was given on his part. That rule does not include direct evidence of the prisoner's guilt. It relates to general proof of character, and nothing else. Facts tending to prove the accused guilty of a specific crime, may incidentally affect his character, as they certainly would, but that is no reason why they cannot be proved. If it were, no person could ever be proved guilty of a crime which he himself did not confess. The proof offered and received by the court was that of a fact constituting a material ingredient of crime. It was direct proof of guilt in no sense in conflict with the rule invoked in support of the exception taken. The object of it was to show that the prisoner was probably actuated by one general intention including all the property he managed to obtain on the three different occasions, and it had a direct tendency to exhibit the nature and character of that intent. It was received solely for that purpose, and directly tended to show an intention to steal when the property was procured which was the subject of the trial. The prisoner was rightly convicted, and the judgment should be affirmed.

DAVIS, P. J., and BRADY, J., concurred.

Judgment affirmed.

COURT OF APPEALS.

NEW YORK, 1875.

LINSDAY V. THE PEOPLE.

The accused was tried and convicted by the Court of Oyer and Terminer in the county of Onondaga, of the crime of murder in the first degree.

The prisoner and one Bishop Vader were jointly indicted for the murder of Francis A. Colvin, charged to have been committed on the 19th of December, 1873. The prisoner was tried separately.

A body was found in the Seneca river, June 22d, 1874, which was identified as the body of Colvin. The skull was found fractured.

Dr. Kimball was called as a witness. He testified to his ability to tell whether the fracture was old or recent, and then he was asked whether the fracture of the bones of the skull of the deceased, as taken from the river, was old or recent. The objection to this was, that the opinion of the witness was not competent. This objection was overruled and an exception taken.

Held, that in this ruling the court committed no error. The objection was not to the competency of the witness, but to the fact sought to be proved. The fact when the injuries to the skull were made was material and could be proved only by the opinion of those who saw it, and were competent to form an opinion. It was the best evidence of which the fact was susceptible.

Vader, the confessed accomplice in the murder, was sworn on the part of the people. The counsel for the accused objected to his evidence being received on the ground that he was a principal, equally guilty with the accused, in the commission of the offence charged.

Held, that an accomplice is, in all cases, a competent witness for the prosecution, but whether he shall be permitted to become a witness, and thus earn an exemption from punishment, which is the implied condition of his turning informer, and declaring the whole truth, is in the discretion of the court and the prosecuting officer. Whether more or less guilty does not affect their competency; the extent of their guilt, and the nature of their offence go to their credit with the jury.

The witness Moore was allowed to answer, under objection, as to the conduct of the accused about the time of the alleged murder.

Held, no error. The acts and declarations of a party are evidence against him, and whether they tend to fix a crime upon him is for the jury. The answer given was stricken out and the jury directed to disregard it, therefore the accused was not prejudiced by it, and beside the court declared it wholly immaterial.

Held, also, that it was not error to permit the witness by other circumstances and events to fix the date when the accused passed with his team. Whether it was satisfactorily fixed was a question for the jury.

Held, that the testimony of Handley was competent. It was important as tra-

cing and identifying the boards, from which the blood was taken, as the same on which the dead body was carried from the barn to the river.

Held, that the proof of finding blood on timbers and boards in barn, six months after the alleged murder, was material. It tended to corroborate the accomplice as to the manner in which, and the course by which, the body was taken from the place of killing to the hay loft. The weight of the evidence was for the jury.

Held, also, that the admission of evidence as to the fact that the accused turned pale at the time of his arrest, was not error. Whether it indicated guilt or not was for the jury to decide.

Held, that the objection to the evidence of Dr. Richardson as to his treatment of the chips from the boards taken from the sleigh of the accused was properly overruled. There was evidence showing that hogs had been dressed upon these boards a day or two after the murder; and there was evidence that the blood of men and hogs were distinguishable, and both were upon these boards. The jury had to find upon these questions.

Held, that proof of the watches carried by the murdered man, shortly before the murder, and that one of them was in possession of the accused a few months thereafter, was proper. Possession of the fruits of a robbery or of the goods of a murdered man soon after the crime, is, unexplained, very persuasive evidence of the guilt of the one so found in possession of the goods. It is impossible to prescribe any definite rule as to the time beyond which a party accused of crime shall not be called upon to account for the possession of property stolen or taken from a murdered man.

Held, that the objection to the evidence of the wife of the accomplice as to the fact of his absence from the house as he testified, was properly overruled. It was a part of the *res gestæ*, and did corroborate the witness in a material fact and was consistent with the entire statement made by him. It being merely a rule of practice, and not of law, that an accomplice should be corroborated to justify a conviction upon his evidence, it is not essential that the confirmation when offered should point directly to the defendant, if it is of any part of the material statements of the witness, the question being in all cases whether the jury under all the evidence will believe the uncorroborated part of the testimony.

(See Code of Criminal Procedure, § 399.)

Held, that the testimony in relation to the movements of the accomplice Vader between the nineteenth and twenty-fifth of December was material and the objection thereto was properly overruled. This evidence was in reply to evidence given on the part of the accused.

J. C. Hunt, for the accused.

Wm. C. Ruger, for the people.

ALLEN, J. The document incorporated in the record, as and for a bill of exceptions, is evidently the joint production of the official stenographer and a compositor in a printing and publishing office of a newspaper; one of the modern self-made "bills of exceptions," by which the labor of elimi-

nating from the record all redundant and irrelevant matter and bringing to light the legal propositions and exceptions, is transferred from the counsel to the court of review. The record contains much of utterly worthless and irrelevant matter, and many, if not a majority of the questions sought to be presented, and the rulings which it is claimed were made and to which exceptions were taken at the trial, can only be ascertained and spelled out by a wearisome reading of long colloquies, uninteresting and, as reported, not always very intelligible, between counsel and court, and in which it is quite apparent that the reporter has not had a very clear view of the ideas intended to be presented by the learned judge presiding and therefore has not well reported him. Again, many, if not most, of the exceptions appear to have been directed by the learned judge and not taken or even adopted by the counsel. All these and other difficulties in the examination of the case would have been obviated had the counsel prepared, in proper form, a bill of exceptions to be sealed by the presiding judges of the court. In a case involving the life of a fellow being we are constrained to overlook all technical defects and want of form in presenting the questions for review, and pass upon every proposition which, upon any fair interpretation of the record, we can see was made or passed upon at the trial. It is not the best form to set out in a case the evidence by question and answer, for the reason that the statements of a witness are more readily and with less labor appreciated and understood when given in a narrative form than in the form more usually adopted. But there is no reason why, this being tolerated, the legal questions, the actual decisions of the court and the point of the exceptions should be left to be spelled out by a reading of long arguments of counsel and badly reported opinions and reasons of judges. The practice is unsafe to litigants and ought not to be sanctioned. Upon a deliberate and full examination of the record before us we are satisfied that the trial was carefully conducted by the presiding judge; and that in every decision made and in the submission of the issues to the jury the court was tender of the rights of the accused, and that the leanings were in his favor to the extent of giving him the benefit of every doubt in the mind of the judge in the admission or rejection of evi-

dence. If this were not a capital case we should content ourselves by an affirmance of the judgment for the reasons assigned by the Supreme Court. But the earnestness and sincerity of the able counsel by whom the plaintiff in error was represented in this court, as well as the nature of the case, make a reference to the questions upon which counsel relied proper.

The first exception is to the opinion of Dr. Kimball, that the fracture of the bones of the skull of the deceased, as taken from the river, had not been recently made. The witness had testified to his ability to determine whether the fracture was old or recent, and the objection was not to the competency of the witness, but to the fact sought to be proved. The condition of the body at the time of its discovery, whether mutilated, or entire and uninjured, decomposed or perfect, and whether the appearances indicated a longer or shorter exposure, and whether injuries or mutilations appearing had been recently made, or were made at some time previous, were all facts pertinent to the issue. The inquiries related to the subject of the investigation, and whether they tended more or less directly to prove the main issue and the cause or time of the death, was not material. The fact that the injuries to the skull had not been made at or immediately before the reclamation of the body from the river could only be proved by the appearance of the fractures and the opinion of those who saw the skull, and were competent to form an opinion. That was the best evidence of which the fact was susceptible. It certainly was competent as a part of the evidence of the condition of the body at the time of the inquest, and it was competent as tending to prove that possibly the wound was inflicted upon the living subject, and was the cause of death. The appearance of the skull could not be so described as to enable the jury to determine the fact sought to be proved. So far as he could, the witness did describe the particular appearance of the edges of the bone upon which his opinion was predicated, and thus gave the jury the benefit of that appearance, and the accused had the benefit of his claim, that the witness should state the appearance which age or newness would exhibit. Whether the fracture was fresh or recent, or discolored and old, was like many other facts, provable

by any witness of common experience and understanding, and did not require an expert. (*People v. Gonzalez*, 35 N. Y., 62.)

Evidence of the color of the hair and whiskers of the deceased, the measure of the body found, and of the stature of the deceased, the evidence of the dentist of the extraction of certain teeth of Colvin, and peculiar marks upon those remaining, and the absence of the same teeth from the jaw found, and the presence of the same marks upon the other teeth in the jaw, all tended to identify the body found as that of Colvin, alleged to have been murdered.

The exception to the evidence of Dr. George in answer to the preliminary question, whether he could determine by the appearance and direction of the wound in what manner the blow was delivered was obviated, as it would seem from the colloquy between the court and the respective counsel immediately following, that the witness was not allowed to state his opinion in respect to the blow. The question answered was merely preliminary to evidence which was excluded.

It is next objected that Vader, the confessed accomplice in the murder, was not a competent witness for the prosecution. The objection is made to rest upon the ground that the witness was a principal at least, equally guilty with the accused in the commission of the offence charged. It was in the discretion of the Court of Oyer and Terminer to refuse the application of the district attorney to enter a *nolle prosequi* of the indictment against Vader, and thus deprive The People of his evidence, but the exercise of that discretion is not reviewable upon error. Accomplices may in all cases, by the permission of the court, be used by the government as witnesses in bringing their confederates and associates to punishment, and whether more or less guilty does not affect their competency, but the extent of their guilt, and the nature of their offence go to their credit with the jury. The rule contended for by the counsel for the accused would exclude all guilty parties, except accessories before or after the fact, or those who act under some duress, or by the direction or under the influence of others. An accomplice is one of many equally concerned, or a copart-

ner in the commission of a crime. The term includes all the *particeps criminis*, whether considered in strict legal phraseology as principals or accessories. (1 Russ. on Crimes, 26.) The only case cited by the counsel in support of his position (*Ray v. State*, 1 Greene [Iowa], 316), does not sustain him. The court held that a *particeps criminis* was competent against his associate in crime, but, as a matter of precaution, he might not be admitted without an order of the court upon an application showing that there was no other person by whom the offence could be proved, and that the witness was not more guilty than the person on trial, and that his testimony could be substantially corroborated. There is no practice in this State requiring a previous application or a formal order of the court to permit an accomplice to become a witness for the State. An accomplice is, in all cases, a competent witness for the prosecution, but whether in all cases he shall be permitted to become a witness, and thus earn an exemption from punishment which is the implied condition of his turning informer and declaring the whole truth, is in the discretion of the court and the prosecuting officer. Although it is not usual to suffer a conviction upon the wholly uncorroborated evidence of an accomplice, and juries are advised not to convict without a confirmation as to the material facts; still, if the jury are fully convinced of the truth of the statements of a witness thus situated, they may convict upon his testimony alone. (*People v. Costello*, 1 Denio, 83; *People v. Doyle*, 21 N. Y., 578; *Dunn v. People*, 29 id., 523.)

The evidence that the plaintiff in error was seen passing in the direction from his own house to that of his father's with his team late in the evening on which Vader had testified that the body of the murdered man was taken from the barn of the prisoner's father to the river, was competent. It tended to confirm the witness as to a material fact stated by him, that the body was carried to the river by the aid of defendant's team and sleigh, which he had brought there and used for that purpose. As said by Judge SMITH, in his opinion in the court below, the evidence was "not inadmissible, because it was not, in its particulars, certain, positive, or conclusive in establishing" the fact of the prisoner's

participation in concealing the body. The evidence of the witness first called to this point, and which was specifically objected to, was not incompetent because he could not fix the day of the month. The time was identified and the day fixed by other witnesses. (*People v. Larned*, 3 Seld., 445; *People v. Gonzalez*, *supra*.)

The question to the witness Moore as to the conduct of the accused about the time of the alleged murder was not objectionable. The acts and declarations of a party are evidence against him, and whether they tend to fix a crime upon him is for the jury. The evidence given in answer to this question was, in the opinion of the court, wholly immaterial, the fact testified to, as interpreted by the judge, being entirely consistent with innocence and it was at once stricken out and the jury directed to disregard it. It could not have prejudiced the plaintiff in error and it is not analogous to the admission of proof of a fact over an objection, and having lodgment in the minds of the jury and a subsequent direction to the jury to disregard it. Here the fact to be called out in answer to the question was not stated to the court in advance; and when it was stated by the witness it was declared immaterial and incompetent. The exception was to the question, which was competent.

There was no error in permitting the witness to fix the date of the passing of the accused with his team on the occasion before referred to by other circumstances and events, the precise time of the happening of which was known. Whether the time was satisfactorily fixed as the nineteenth of December when Vader, the accomplice, testified that he with the defendant and his team removed the body, was for the jury.

The testimony of Handley as to the housing of the sleigh and the manner in which it was stored was important and competent as tracing and identifying the boards from which the blood was taken, as the same on which the dead body was carried from the barn to the river.

Proof of finding blood on different timbers and boards of the barn after the discovery of the body in June, six months after the alleged murder, was competent as it tended to corroborate Vader as to the manner in which, and the course by which, the body was taken from the place of killing to

the hay loft. So far as lapse of time detracted from the force of the evidence it was for the consideration of the jury.

That the fact that the accused turned pale at the time of his arrest charged with the murder, was at the most but slight, if any, evidence of guilt, did not render proof of the fact incompetent. Whether it indicated guilt or was merely the disturbance of the physical system, which would be as likely to appear in an innocent as a guilty man, was for the jury, in the light of other circumstances, and the acts and declarations of the accused: Singly it might not justify an inference of guilt, but it was, nevertheless, admissible that the jury might pass upon its indications. As remarked in relation to another exception, the question called for his looks and appearance, and for facts and not for an opinion; the witness was asked if he noticed anything and what it was, and there was no objection to the particular answer given.

The objection to the evidence of Dr. Richardson as to his treatment of the chips from the boards taken from the sleigh of the accused was properly overruled. The objection was that the boards had been for a long time out of the possession of the prisoner and used by other people. There was some evidence that the boards were in the same condition as when they left the possession of the prisoner; and although the evidence was subject to criticism, and the identity of the boards and that the spots were caused by the flow of blood from the dead body of Colvin, were proper matters for argument; and the circumstance that the facts claimed by the prosecution were not proved beyond all controversy and with entire conclusiveness, did not render the result of Dr. Richardson's experiments inadmissible. The questions of fact, viz., the identity of the board and that the blood spots were on them from the night of the nineteenth December, had to be found by the jury before effect could be given to the evidence of the expert. It is enough that there was evidence tending to prove these facts. There was no evidence that the boards had been tampered with, or were in any different condition or differently stained than when they left the possession of the defendant and as they were the day of the murder, except that hogs had been dressed upon them within a day or two after the alleged

murder; and there was evidence, upon which the prosecution relied, that the blood of men and of hogs was distinguishable and that both were upon these boards.

Proof and a description of the watches carried shortly before the murder, by the deceased, followed by evidence that one of the watches was in the possession of the prisoner a few months thereafter, and seen only on a single occasion was proper. Possession of the fruits of a robbery or of the goods of a murdered man soon after the perpetration of the crime, is, unexplained, very persuasive evidence of the guilt of the one so found in the possession of the goods. The deceased was proved to have carried the two watches, and was seen to have them in November, and the murder is alleged to have been committed in December, and there was evidence for the jury tending to prove the possession of one of them by the defendant in May following. The lapse of time between the different events proved did not, under the circumstances, render the evidence incompetent, but went to its cogency as proof of guilt. It is impossible to prescribe any definite rule as to the time beyond which a party accused of crime shall not be called upon to account for the possession of property stolen or taken from a murdered man. (Burrill's Cr. Ev., 445 *et seq.*, and cases cited.) The more recent the possession the more cogent the evidence, and the lapse of time weakens the presumption of guilt while other circumstances, such as the manner of keeping or using the article may affect the inference to be drawn from the possession.

There was no objection taken to the wife of Vader, the accomplice, as a witness. There is, therefore, no question as to her competency before us. The exception is to evidence given by her to the effect that her husband was absent from the house until a late hour of the night on which he testified that the prisoner and himself removed the body of the murdered man from the barn where it had been concealed during the day, and sunk it in the river. The evidence related very closely to the main transaction, and so far as the principal witness was concerned, tended directly to connect him with it. Although it concerned only the witness, and not the party on trial, it was of a fact not wholly disconnected with the crime, or immaterial to the investigation. It was a part of

the *res gestæ*, and did corroborate the witness in a material fact and was consistent with the entire statement made by him. It was a fact so material to the whole story told by the witness, that had it been proved that he was in the house during the hours mentioned his whole statement would have fallen to the ground, and been proved false. As we have seen, it is competent for the jury to convict upon the uncorroborated testimony of an accomplice, and when corroboration is deemed safe, or even necessary, the rule as to the manner and extent of the corroboration is not definitely settled. Learned judges have differed on the subject. Chief Baron Joy, in his treatise on the Evidence of Accomplices (page 98), says: "The only rule, therefore, which has the appearance of reason to support, is that which I have endeavored to show, has uniformly and without an exception been laid down and acted upon by the English judges, which is, that, the confirmation ought to be in such and so many parts of the accomplice's narrative as may reasonably satisfy the jury that he is telling truth, without restricting the confirmation to any particular points, and leaving the effect of such confirmation (which may vary in its effect, according to the nature and circumstances of the particular case) to the consideration of the jury, aided in that consideration by the observations of the judge." In *Rex v. Beckett*, (1 R. & R. Cr. Cases Reserved, 251), the twelve judges agreed that "an accomplice did not require confirmation as to the person he charged if he was confirmed as to the particulars of his story." This does not, of course, imply that a confirmation as to wholly immaterial matters, for example, as to the place of his birth, his age, his residence, but the detail of the crime and matters connected with it. *People v. Davis* (21 Wend., 309) is not inconsistent with the authorities cited. The General Sessions of New York had charged the jury that the witnesses who were accomplices of the prisoner were not to be believed by them, unless confirmed by other credible witnesses, in respect to the facts connecting the prisoner with the possession of the forged bills or with the manufacture of them. Judge NELSON says of these instructions, that, "they were as favorable to the prisoner as the most liberal cases on the subject recommend; certainly more so than can be exacted of the court

by the settled rules of evidence." The absence of the witness from his house on the business of concealing the body of the deceased, upon the night in question, was a material part of the narrative, and when it was proved that the prisoner was going at the time and under the circumstances stated, in the direction of the alleged place of rendezvous, the confirmation of the witness as to his unusual absence from home, was not only a confirmation of a material part of the story, but indirectly tended to connect the accused with the crime. It being merely a law of practice, and not of law, that an accomplice should be corroborated to justify a conviction upon his evidence, it is not essential that the confirmation when offered should point directly to the defendant, if it is of any part of the material statements of the witness, the question being in all cases whether the jury under all the evidence will believe the uncorroborated part of the testimony.

The commitment of one of the witnesses for the accused, for perjury, was not error of which the accused can complain. If it was improper and the prisoner was prejudiced by it with the jury, the remedy was by motion for a new trial. The arrest occurred during the trial, but was no part of the trial, and does not properly have a place in the bill of exceptions.

The movements of Bishop Vader and the other parties named between the nineteenth and twenty-fifth of December became important in determining precise dates which were necessary to be established, and in reference to which there was a controversy. These dates were material to the issue, and upon their determination depended very greatly the whole frame work of the narrative of Vader, the accomplice, upon whose testimony a conviction was asked. It follows that the evidence of the presence of different parties at Baldwinsville on the several days mentioned in the record was competent as bearing upon the main issue, and the truth of Vader which was sought to be overthrown by like proof, and it was in reply to such evidence that the testimony objected to was given.

Whether the deceased was at Spore's on one or the other of two Sundays was a material question, the defence having given evidence tending to show that he was there on the

Sunday following the day of the alleged murder. Hence it was material for the prosecution to prove that it was the Sunday previous, and the evidence offered to establish that fact was competent. The same remark applies to evidence given as to the time when deceased was at the house of Odell.

The objection to the evidence of Baker, tending to show the time when the last load of oats was delivered at Baldwinville, and that they were paid for two or three days thereafter, was properly overruled for the reason assigned by Judge SMITH in the Supreme Court.

Upon a careful examination of the whole case, and every exception taken at the trial, we have found no error to the prejudice of the plaintiff in error.

The judgment must be affirmed.

All concur; except MILLER, J., not voting.

Judgment affirmed.

COURT OF APPEALS.

NEW YORK, 1876.

TULLY v. THE PEOPLE.

The accused was tried and convicted of the crime of mayhem, at a court of Oyer and Terminer of the county of Kings.

The indictment charged the accused, in substance, with wilfully and feloniously and with premeditated design making an assault upon one Walter Westlake and did then and there wilfully and feloniously and from premeditated design, with his teeth, did cut, bite, slit, and destroy on purpose, with intent, then and there and thereby, in manner aforesaid, the thumb of the said Walter Westlake, then and there to maim and disfigure, against the form of the statute, &c.

On the trial it was shown, that the accused and Westlake were riding in the same street car in the city of Brooklyn; the accused not paying his fare was put off by the conductor; that he soon got on again and forced his way into the car, saying, "Let me in till I eat somebody." After he got in he caught hold of the conductor and bit his thumb. Westlake told him to be quiet as there were ladies in the car; he then sat down. Not long after the accused jumped up, struck Westlake, and seized his nose with his teeth. Westlake put up his hand to protect his face when the accused

took hold of Westlake's thumb with his teeth and began chewing it, and continued to chew it until he reached the platform of the car and was forced off by the other passengers. The thumb of Westlake was permanently disabled.

At the close of the evidence the counsel for the defendant requested the court to charge the jury :

First. " Under the indictment in this case, the defendant cannot be convicted of mayhem, in cutting off or disabling the thumb of the complainant.

Second. " The indictment does not allege that the thumb was cut off or disabled.

Third. " The allegation in the indictment that the thumb was destroyed, is disproved by the evidence, the thumb still being perfect on the hand of the complainant, whether disabled or not.

Fourth. " There is no evidence, in the case, of premeditated intent, such as is called for by the statute defining the crime of mayhem.

Fifth. " The premeditated attempt required by the statute, must be evinced by lying in wait or some similar means, and no such evidence has been offered in the case.

Sixth. " The indictment in this case is not sufficient as an indictment for mayhem, and is only good as an indictment for assault and battery."

The court declined so to charge, but did charge, that as to the first three propositions, the word "destroy," as used in the indictment, necessarily included the word "disabled," and that proof that the thumb was disabled answered the averment, and was sufficient to sustain the indictment. The counsel for the prisoner duly excepted.

Held, that the offence is complete whenever a person having formed a design to maim another, proceeds to and does execute it. The jury must find as a fact, before there can be a conviction, that there was a premeditated design to maim, and it must be averred in the indictment.

Held, that the manner in which this design was evinced, and the circumstances establishing it are matters of evidence to be proved on the trial ; the issue being, whether the particular injury was deliberately and intentionally committed.

Held, that the English statute made the maiming of another an offence only when there was premeditation evinced in a particular manner, viz., "by lying in wait." The intention of our statute was to enlarge the definition of the offence, and to include within it all cases of designed and premeditated maiming, and the words "or in any other manner," were inserted for that purpose.

See *Godfrey v. The People*, ante, 209.

Held, that it is a well settled rule of criminal pleading that an indictment upon a statute, must state all the facts and circumstances which constitute the statutory offence, but it is not necessary that the words of the statute should be precisely followed. Words of equivalent import may be substituted, or words of more extensive signification, and which necessarily include the words used in the statute. The word "destroy" used in the indictment is more comprehensive than the word "disable," and it includes what is signified by it, and the indictment is not defective by reason of the substitution.

Held, that it was proper to leave the question to the jury whether the prisoner, by premeditated design, inflicted the injury complained of. The design must precede the conflict, and not originate with or grow out of it. But it is a question of fact for the jury.

Wm. F. Howe, for the prisoner.

Thomas S. Moore, for the people.

ANDREWS, J. The offence of mayhem is defined by the statute as follows:

"Every person who, from premeditated design, evinced by lying in wait for the purpose, or in any other manner, or with intention to kill or commit any felony, shall (1) cut out or disable the tongue; or (2) put out an eye; or (3) slit the lip or destroy the nose; or (4) cut off or disable any limb or member of another on purpose, on conviction thereof, shall be imprisoned, etc." (2 R. S., 665, § 27.)

The prisoner was convicted under this statute for disabling the thumb of the prosecutor by biting. The parties at the time of the injury were in a street car in Brooklyn. The prisoner caught the thumb of the prosecutor between his teeth, and held it there for some moments, meanwhile biting through and separating the joint, thereby permanently stiffening and disabling it. The indictment charges that the prisoner (Tully) "with force and arms in and upon one Walter Westlake, wilfully and feloniously, and with premeditated design did make an assault, and that the said Owen Tully with the teeth of him, the thumb of him the said Westlake, then and there wilfully and feloniously, and with premeditated design, did cut, bite, slit, and destroy on purpose, with intent, etc., to maim, and disfigure," etc.

It is insisted that the indictment is defective in not averring the manner in which the premeditated design was evinced. This was unnecessary. The offence is complete whenever a person having formed a design to maim another, proceeds to, and does execute it. The jury must find as a fact, before there can be a conviction, that there was a premeditated design to maim, and it must be averred in the indictment. But the manner in which this design was evinced, and the circumstances establishing it are matters of evidence to be proved on the trial. The issuable fact on

this branch of the case is whether the particular injury was deliberately and intentionally committed. The conduct of the accused before and at the time of the transaction, the preparation made and his lying in wait, his threats and declarations tending to show his intention in making the assault, with many other facts and circumstances which might be suggested, may be given in evidence upon the issue of premeditation, but it would be improper, and often impracticable, to spread them out in the indictment. The learned counsel for the prisoner in insisting upon this point, has been misled by a supposed analogy, in indictments under our statute, and under the statute 22 & 23 Caroline II, chapter 1. That statute is "that if any person shall on purpose, and of malice aforethought, by lying in wait," etc., do any of the acts specified, he shall be guilty of mayhem. It was held, that an indictment under this statute must aver a lying in wait (3 Chitty Cr. Law, 786), and for the reason manifestly that without the averment, no crime under the statute would be charged. It made the maiming of another an offence only when there was premeditation evinced in a particular manner, viz., "by lying in wait." The reason for the decision under the English statute has no application to indictments under our statute. The intention of our statute was to enlarge the definition of the offence, and to include within it all cases of designed and premeditated maiming, and the words "or in any other manner," were inserted for that purpose.

The indictment is also claimed to be defective for the reason that it does not allege that the prosecutor's thumb was "disabled." The fourth specification of the statute is, "or shall cut off or disable any limb or member," and the indictment charges that the prisoner did "cut, bite, slit, and destroy," the thumb of the prosecutor. It is a well-settled rule of criminal pleading that an indictment upon a statute must state all the facts and circumstances which constitute the statutory offence, but it is not necessary that the words of the statute should be precisely followed. Words of equivalent import may be substituted, or words of more extensive signification, and which necessarily include the words used in the statute. The decisions are by no means uniform on the subject, and elsewhere great particularity

has been required in framing indictments upon statutes, and in some cases it has been held that the precise language of the statute must be used. But the rule in this State is in conformity with the more liberal doctrine above stated. (*People v. Enoch*, 13 Wend., 172; *People v. Holbrook*, 13 J. R., 90; *People v. Rynders*, 12 Wend., 427; *Fraser v. People*, 54 Barb., 306; *People v. Thompson*, 3 Park., 208; see also Wharton's Crim. Law, vol. 1, § 376; *Rex v. Fuller*, 1 B. & P., 180; *State v. Little*, 1 Vt., 534; *State v. Hickman*, 3 Halsted, 299; *United States v. Bachelder*, 2 Gall., 15; *State v. Keen*, 34 Me., 500.) The word "destroy" used in the indictment is more comprehensive than the word "disable," and includes what is signified by it, and the indictment is not defective by reason of the substitution.

We are also of opinion that the evidence warranted the submission to the jury of the question whether the prisoner, by premeditated design, inflicted the injury complained of. It is quite clear that there may be a maiming, resulting from an unlawful assault which could not be punished under the statute in question. The maiming must be the result of premeditation and design, and it has been recently decided in this court in *Godfrey v. The People* (63 N. Y., 207), that the design must precede the conflict, and not originate with, and grow out of it. But in general the question whether there was premeditation will be one of fact for the jury, and not of law for the court. There are circumstances, we think, in this case from which the jury might have inferred that during the interval between the time the prosecutor first addressed the prisoner and the time when the prisoner commenced the affray, a space of several minutes, he formed the intention to inflict the injury which followed. The case is not without evidence bearing upon that question, and it was carefully submitted to the jury with instructions upon the law, quite as favorable to the prisoner as he was entitled to.

We think there was no error in any of the rulings on the trial, and that the judgment of the General Term should be affirmed.

All concur.

Judgment affirmed.

SUPREME COURT.

First Department—New York, 1875.

BURKE V. THE PEOPLE.

The Court of General Sessions of New York city and county, with a jury, convicted the accused of the crime of mayhem, and he was sentenced by the Recorder to imprisonment in the State prison, for the term of fifteen years.

The indictment charged, that the accused did feloniously bite off a piece of the left ear, and disable a member of one James McLaughlin, and that he did feloniously and on purpose maim him, against the form of the statute.

On the trial the prosecution asked a witness, under objection, "Do you remember what McLaughlin said about Burke's coming into the store?" The answer was, "Yes, sir; he told me, when I wanted him to go and sit down and go to sleep, that he was afraid Burke would come in and beat him. I said 'nobody will beat you; sit down and go and take a sleep.'" A motion was made to strike out this answer, and it was denied.

Held, that the statement of the complainant before the occurrence, when the prisoner was not present, was not admissible. In the exercise of a sound discretion, the testimony should have been stricken out. It was entirely incompetent.

The court was asked to charge the jury that the fact of lying in wait was not made out by the prosecution. The court declined, and an exception was taken.

Held, that the prosecution did not make out the fact of lying in wait, contemplated by the statute. The jury could not assume that he was, when the evidence did not warrant it; and the absence of proof of a material fact like that, was a feature in the prosecution to which the prisoner was clearly entitled.

The court was also requested to charge the jury that the offence committed was not mayhem, as contemplated by the statute. The court declined so to charge, and the prisoner's counsel excepted. The court did charge, that it was a question for the jury to say whether his ear was bit off by this man, and whether there was any disability to the ear from this partial destruction. If they shall so decide, I shall instruct them to convict this man of the charge. There was an exception to this.

Held, that, under the evidence, the Recorder was in error. There was no evidence that the ear was disabled. The physician did not so state. Its perfection was destroyed, but its usefulness was not affected. The disability was not for the speculation or conjecture of the jury, but to be considered and disposed of on the evidence.

Peter Mitchell, for the prisoner.

B. K. Phelps, for the people.

BRADY, J.: The injury inflicted upon the complainant is described by the physician who attended him, thus: "The wound was merely the outer edge of the left ear; it was pulled off from there right down to the lower lobe of the ear; it was merely the outer edge, just reaching as far as the cartilage—a simple, clean wound." "This cut was one-eighth of an inch deep all the way round." The circumstances under which the wound was made were these: The complainant and prisoner had been together, drinking and disputing, but had not come to blows. They separated, the complainant going to a saloon, and the prisoner elsewhere. The complainant, from some fancy that the prisoner would return and assault him, tried to borrow a pistol, and then an ice-pick, but getting neither, he took a poker and kept it. The prisoner finally came into the saloon, and presently went up to the complainant, taking hold of the lapel of his coat. It was, it would seem, a social approach. It is apparent that it was not a hostile demonstration—at all events, from the testimony given. The complainant was very much intoxicated then, and there is no doubt that the prisoner was drunk. While in this position, something was said by the prisoner, which is not revealed, and the complainant thereupon struck at him with the poker. They clinched, and the prisoner bit his ear. It would seem from the evidence of the physician, that he must have seized the outer edge with his teeth, and torn off that part of the complainant's ear, unless, indeed, the complainant tore it off in his efforts to free himself. The complainant did not know at the time that his ear was bitten, and could not say that the prisoner did it. He had, as he stated, another matter with a man before his collision with the prisoner. He also admitted that he was a quarrelsome man when in liquor.

Upon the trial, the district attorney asked the bartender of the saloon the following question: "Do you remember what McLaughlin said about Burke's coming into the store?" and he answered, "Yes, sir; he told me, when I wanted him to go and sit down and go to sleep, that he was afraid Burke would come in and beat him. I said 'nobody will beat you; sit down and go and take a sleep.'" The counsel for the prisoner moved to strike out this answer, upon the ground that he did not hear the question put to the wit-

ness, and because of its incompetency. The application was refused, and exception was taken to such ruling. There is no doubt, it should be said here, that the injury received by the complainant was the result of a drunken brawl, and none that it was inflicted by premeditation — *by lying in wait* for that purpose. The collision which occasioned it was one really begun by the complainant, who, as already stated, on some observation being made, struck at the prisoner with a poker. During their wanderings earlier in the day, they had wordy disputes, as the complainant said, but the prisoner had neither struck him nor threatened to strike him, and the case presents no evidence which warrants the conclusion that he designed to do him any harm other than taking hold of the lappels of his coat, which, as already suggested, was apparently a social and not a hostile action.

The statute under which the prisoner was convicted is as follows:

“Every person who, from premeditated design, evinced by lying in wait for the purpose, or in any other manner, or with intention to kill or commit any felony, shall,

1. Cut out or disable the tongue; or,
2. Put out an eye; or,
3. Slit the lip, or destroy the nose; or,
4. Cut off or disable any limb or member of another, on purpose, upon conviction thereof, shall be imprisoned in a State prison for such term as the court shall prescribe, not less than seven years.” (2 Edmonds' Statutes at Large, 683, 684.)

The court was asked to charge the jury that the fact of lying in wait was not made out by the prosecution, and the court declined so to charge, to which exception was duly taken. The court was also asked to charge that the jury could find a verdict of assault and battery. The request was granted, but coupled with a statement that the jury could find a verdict of arson, or anything they liked; that they had the physical power to do so, but they should hold themselves responsible to their oath and intelligence to decide according to evidence and the law. The court was also requested to charge the jury that the offence committed was not mayhem, as contemplated by the statute, and the proposition evidently rested upon the fact that a portion of

the ear only was destroyed. The court, in answer to this request, said: "The mere fact that the ear was partially taken off—that that should constitute no offence—that the ear should be perfectly destroyed, I shall leave to the jury to say whether any disability was attached to this ear. The ear is a member of the human face. It is a component part of a man's countenance. It is not denominated by the statute. It would be an absurdity to say that the statute limits the application to the entire destruction of this member. In order to provide for that difficulty, the statute says, if any person shall 'cut off or disable any limb or member.' It is a question for the jury to say whether this ear was bit off by this man, and whether there was any disability to the ear from this partial destruction. I shall leave that to them. If they shall so decide, I shall instruct them to convict this man of the charge." The prisoner's counsel excepted to this ruling.

Upon the exceptions thus stated the appeal in this matter depends. In reference to the first, it may be said that the statement of the complainant before the occurrence, when the prisoner was not present, was not admissible. It is not necessary to cite authorities for a rule so well established by the law of evidence. The testimony was admitted without objection, it is true, but that arose from the failure of the prisoner's counsel to hear the question, if we are to believe his declaration in open court, and which was not questioned. The statement was injurious to the defence of the prisoner, because he claimed to have acted in self-protection; and the effect of it was to make the prisoner the aggressor, and to put the complainant in fear of bodily harm, thus justifying his resort to the poker when he could get neither pistol nor ice-pick, when, on his own testimony, there was nothing from which he was authorized to draw the conclusion that the prisoner meant to assail him in such way as to put him in any jeopardy. In the exercise of a sound discretion, the testimony should have been stricken out. It was entirely incompetent. (See *People v. McMahon*, 2 Park., 663.)

In reference to the second exception, it is clear, beyond all doubt, that the prosecution did not make out the fact of lying in wait, contemplated by the statute. The intention of the prisoner to do what he did, was not evinced by lying

in wait for the purpose, according to the testimony, and he was entitled to the benefit of the request made. The refusal to charge as requested was error therefore. It may be that it was not necessary to prove that fact; indeed, it is quite apparent that it was not because the premeditation might be shown "in any other manner," because the prisoner's case was to be determined by the "other manner" when it was not shown that he was lying in wait. The jury could not assume that he was, when the evidence did not warrant it; and the absence of proof of a material fact like that, was a feature in the prosecution to which the prisoner was clearly entitled.

In reference to the third exception, it must be said that there was no evidence that the ear was disabled. The physician did not so state. Its perfection, as an organ of the human frame, was destroyed, but its usefulness for the purpose for which it was designed, was not at all affected, if this case is to be disposed of on the evidence. There was no distinct exception to this part of the answer of the court, given to the request in relation to the necessity of showing the entire destruction of the ear, but the exception was to the ruling upon the request, and it was part of the ruling that it should be left to the jury to say whether any disability was attached to the ear. In this, under the evidence, the learned recorder was in error. The disability was not for their speculation or conjecture, but to be considered and disposed of on the evidence. Whether the offence of which the prisoner stood charged, was within the statute to which reference has been made, it may not be necessary here to decide; because, assuming it to be, the exceptions taken are such as to require a new trial; but it is proper to say that it comes, if at all, within the statute, certainly and only within the fourth class, namely, "to cut off or disable any limb or member;" and to bring it within that class, the cutting or disabling must be done on *purpose*, that is, with premeditation. It must be designedly done. It must be the intention to do it; otherwise it is not done on purpose; and, it seems to me, must not be, under a proper interpretation of the statute, the result of an unexpected instantaneous encounter, or of the heat of sudden passion, or of the excitement produced by the fear of bodily harm. The violent inten-

tional disfigurement of the ear is an offence which should be punished, and doubtless with severity; and it may be that such an act would be a felony within the provisions of the statute mentioned, although the legislature has not so expressly declared. It reads, "to cut off or disable." It is not mayhem at common law to cut off an ear. It is not, by the principles of that system, regarded as rendering a man less competent to attack his adversary or to defend himself. (Barb. Crim. Pr., 81; 4 Black. Com., 205; Ros. Cr. Ev., 654 [ed. 1836]; 1 East P. C., 393; *State v. Marns*, 1 Coxe, 453; *Comm. v. Newell*, 7 Mass., 245.) We think, however, that upon the exceptions discussed, the prisoner is entitled to a new trial. We arrive at this conclusion the more readily, because we think that the observations which accompanied the charge that the jury might find a verdict of assault and battery, were such as in effect to modify the charge on that subject, or destroy its benefit to the prisoner, and thus leave the jury to infer that such a verdict would be at variance with their intelligence and the evidence and the law. It was not so intended, doubtless, and perhaps there may be some inaccuracy in the report of the language used, but we find it in the case, and feel it our duty to allude to it.

Judgment reversed and a new trial ordered.

DAVIS, P. J., and DANIELS, J., concurred.

Judgment reversed, and a new trial ordered

COURT OF APPEALS.

NEW YORK, 1876.

THE PEOPLE EX REL. STOKES V. THE WARDEN, ETC.

The General Term of the Supreme Court, in the Second Judicial Department, dismissed a writ of *certiorari* brought to review a decision on a writ of *habeas corpus* issued upon the petition of the relator remanding him to the custody of the Warden of the State prison at Sing Sing.

On the 6th day of January, 1873, Stokes, the relator, was adjudged guilty of murder and sentenced to be hung on the twenty-eighth day of the next month, February. The relator brought his writ of error, the execution had been stayed, the judgment on the 10th of June, 1873, was reversed and a *venire de novo* ordered. On the 29th of October, 1873, the relator was again tried and convicted of manslaughter in the third degree. On that day he was sentenced to State prison at Sing Sing for the term of four years. In the meantime he had been imprisoned in the jail of New York county. His first day of confinement in the State prison was the first day of November, 1873. It was certified by the warden of the prison that his conduct from the 1st day of November, 1873, to the date of the certificate, 14th Jan. 1875, had been good, and in adherence and obedience to the prison officials and discipline. On the 5th of February, 1876, he was, by *habeas corpus*, brought out of prison and asked for his discharge from imprisonment. The request was denied, and he was remanded.

The relator claims that the time he was in jail in the city of New York should be taken as part of the four years of his sentence, and also, that he had earned by good conduct, while in State prison, an abatement from the term of his sentence; both equalling four years.

Held, that punishment for crime is that pain, penalty or forfeiture which the law exacts, and the criminal pays for the offence. Punishment is the immediate consequence of a conviction for crime. The pain or penalty which the relator suffered in jail was before conviction and sentence, it was not based upon the judgment of a court or jury; he was not serving any part of his sentence; he was not in State prison; he was not at hard labor; he was held by the requirements of the law which prescribes, that persons indicted for murder may be kept in close custody until their trial for that crime is ended.

Charles W. Brooke, for the relator.

Benjamin K. Phelps, for the people.

FOLGER, J. Before the 6th day of January, 1873, the relator had been indicted and put on trial for the killing of James Fisk, Jr. On that day he was, on the verdict of a jury,

adjudged guilty of murder and sentenced to be hung on the twenty-eighth day of February, then next. The sentence was not executed. The relator had brought his writ of error, and proceedings had been stayed. The judgment was reversed by this court, on the 10th of June, 1873, and a *venire de novo* ordered. On the 29th October, 1873, the relator was again put upon trial under the same indictment, and was, on the verdict of a jury, adjudged guilty of manslaughter in the third degree. In the meantime, he had lain in jail, in New York county. He was, on that day, sentenced to be imprisoned in the State prison at hard labor, for the term of four years. This term of imprisonment is the *maximum* punishment for that crime. He was actually for the first time put into a State prison at Sing Sing, on the 1st day of November, 1873, and has been kept there ever since, it is to be assumed, at hard labor. On the 14th January, 1875, the agent and warden of that prison made a certificate dated that day, that the relator had faithfully performed such work and labor as had been assigned to him, and that his conduct from the 1st November, 1873, to the date of the certificate had been good, and in adherence and obedience to the prison officials and discipline. On the 5th February, 1876, he was brought out of the prison by writ of *habeas corpus*, and claimed to be discharged from imprisonment and set at liberty. This was denied and he was remanded.

The sole claim for his discharge is, that he has suffered imprisonment in accordance with the sentence passed upon him for the full term of it, so far as in law it is now capable of infliction.

It is at once apparent, that from 29th October, 1873, to 5th February, 1876, is not a term of four years. So, it is plain, that the relator has not been in a State prison at hard labor for that length of time, and has not thus satisfied the sentence. But the relator claims that the time from the 6th of January, 1873, to 29th October, 1873, during which he was kept in the New York county jail, is to be taken as part of the four years of his sentence; and he further claims, that he has in accordance with certain statutes (see Laws of 1862, chap. 417; Laws of 1863, chap. 415; Laws of 1864, chap. 321; Laws of 1874, chap. 451, p. 598, § 12), earned by good conduct in State prison, an abatement from the term

of his sentence. It is conceded, that these two, together with the time for which he has been actually kept in the State prison, will equal four years. Still we cannot yield to this claim of the relator. His counsel is obliged to admit that the conviction for manslaughter was legal, that the court of Oyer and Terminer had thereupon the power to impose upon him a sentence of imprisonment in the State prison, at hard labor, for four years. The conviction being legal and the sentence in accordance with law, it follows that the State may exact from him the full endurance of the sentence and of every part of it. He may not be relieved until he has shown full endurance, or executive pardon, or what is tantamount thereto. Nor may he claim relief as matter of right, until, according to the letter of it, he has shown full endurance.

Punishment for the commission of crime is that pain, penalty or forfeiture which the law exacts, and the criminal pays or suffers for the offence. In legal view, it cannot be said to have been exacted, nor to have been endured or begun to be endured, until the commission of the particular crime has been legally determined, and the particular criminal legally ascertained; nor until the due sentence, that is, the judicial fixing and utterance, of the definite kind, amount, or period of punishment has been authoritatively, and in due form of law and proceeding, pronounced upon him for his crime, after his conviction therefor. Punishment is a consequence of crime, to be sure, but in a legal view, it is the immediate consequence of only a conviction of crime. Hence, any pain or penalty which the offender has suffered before conviction and before sentence has been pronounced upon him is illegal, or is due to some demand of the law other than that based upon his conviction. In either case, it fails to enure to his benefit as part of that due punishment which the law exacts, by reason of his conviction and of the sentence passed upon him.

Again, as a general rule, from which this case is not an exception, no pain or deprivation which a person suffers in accordance with law, can be made, as of his right, to answer at once two distinct and different requirements of the law. The imprisonment of the relator in the county jail was by virtue of one requirement of law, to wit: that persons in-

dicted for murder may be kept in close custody until their trial therefor is ended. It was for that reason a lawful imprisonment. It could have been, for that reason, justified by the keeper of the county jail. It was a satisfaction, then, of that specific legal exaction, quite another exaction than that by virtue of this sentence, and it was a satisfaction of that other legal exaction only; when, after that arose the legal exaction by virtue of the sentence upon this conviction, the imprisonment which the relator had undergone in answer to that other requirement, had been applied and spent in satisfying it, and may not now be applied in satisfaction of this later demand of the law. The learned counsel for the relator admitted, upon the argument, that the imprisonment in the county jail was legal, and that the relator could not have obtained a discharge therefrom. That period of imprisonment was, then, appropriated and consumed by some demand of the law, other than the conviction of October 29, 1873, and the sentence thereupon, and does not now exist, so as to be applied in satisfaction of the latter. Moreover, important parts of the sentence are the place of imprisonment, to wit: in a State prison, and the manner of detention there, to wit: at hard labor. When the relator lay in the county jail, he was not enduring these parts of the sentence; he was not in State prison; he was not at labor. How then can the time he lay in the county jail be reckoned a part of the time for which the law adjudged him to be at labor in the State prison? Doubtless, a court when imposing sentence of imprisonment may consider in mitigation of the severity of it, the time for which the convict has been in custody while awaiting trial. And this is the only force of the instances brought forward by the learned counsel. It is matter of discretion only, and the discretion is exercised upon that fact, the same as upon any of the circumstances of the case which may be urged upon the court for mitigation of punishment.

If the time during which the relator was confined in the county jail is not allowed to him, the time which should be awarded to him for good conduct in State prison will not now avail to procure his discharge. Hence, it is not needful that we consider at length, whether the awarding thereof is within the province of the courts. It will suffice here to

say that the learned counsel for the relator has failed to convince us that the courts may interfere to make that award. There may be question whether it is not a matter for the executive alone.

The order of the General Term should be affirmed.

All concur.

Order affirmed.

SUPREME COURT.

Fourth Department—New York, 1876.

ORTNER V. THE PEOPLE.

The Court of Sessions for the county of Erie, and a jury, tried and convicted the accused of perjury. On the trial a motion was made to quash the indictment on the ground that it did not state all the facts necessary to make the defendant guilty of the offence charged, and, that it did not show the defendant guilty of any offence punishable by law. The motion was denied.

Held, that the denial of the motion was error. The gist of the offence charged was, that the defendant wilfully and corruptly swore falsely, in an affidavit made by him for the purpose of obtaining an audit of an unliquidated claim which he had against the city of Buffalo, by the common council of that city, pursuant to section 7 of title 3 of the charter thereof. It is not averred in the indictment, that the affidavit was authorized by the charter; nor that it was made for the purpose required by section 7 of title 3; nor that the claim to which it was appended was ever presented to the common council for audit. Without these averments, sustained by proof, the offence would not be made out. The rule is, that if the indictment does not set forth the facts requisite to constitute the offence charged, a conviction upon it cannot be sustained.

Lewis & Gurney, for the accused.

Benjamin H. Williams, district attorney, for the people.

GILBERT, J.: The gist of the offence of which the prisoner was convicted, consists of wilfully and corruptly swearing false, in an affidavit made for the purpose of obtaining an audit of an unliquidated claim which he had against the city of Buffalo, by the common counsel of that city, pursuant to section 7 of title 3 of the charter thereof. That sec-

tion prohibits the common council from auditing any such claim, unless it be made out in detail, with certain prescribed specifications, nor unless accompanied by an affidavit that the claim and the items and specifications thereof, are in all respects just and correct. (2 Laws 1870, 1179, § 7.) Section 11, of title 16, provides, that every person who shall wilfully and corruptly swear false to any material fact in *any affidavit authorized by the act*, shall be guilty of perjury.

It is not averred in the indictment, that the affidavit was authorized by the charter, nor that it was made for the purpose required by section 7 of title 3, nor that the claim to which it was appended was ever presented to the common council for audit. The averment is, that the prisoner caused his bill to be presented to Mr. Ditto, the engineer, and that he made the affidavit before Mr. Pierce, who was a commissioner of deeds and a clerk in the office of the engineer. But it is not averred that it was any part of Mr. Ditto's duties to receive the bill, or that he in fact received it for any purpose connected with the audit. Without the averments omitted, or equivalent ones sustained by proof, the offence would not be made out; for if the affidavit was made for any other purpose than that of obtaining an audit of the claim, and was misapplied, it was not authorized by the charter, and perjury could not be assigned upon it under section 11 of title 16. It is a familiar rule, that if the indictment does not set forth the facts requisite to constitute the offence charged, a conviction upon it must be reversed.

The provisions of the Revised Statutes which define the crime of perjury (2 R. S., 681, § 2), cannot be applied to the case. It would not under any circumstances fall under subdivision 1 of that section. It might possibly fall under subdivision 2, if the indictment contained an averment that the affidavit was necessary in the prosecution of a private right of the prisoner. But the indictment does not show that fact. The learned district attorney replied to the objection that the indictment was defective, by referring us to the third subdivision of that section, which applies to a case where any oath may be lawfully required by any administrative officer. There are three answers to this:

First. The oath was not in fact required, but was made voluntarily; nor does it appear that Mr. Pierce, who took

the affidavit, was authorized by the common council, or that it was his duty as a city officer, to make such a requisition ; or that there is any law conferring such authority upon him.

Second. It could not lawfully be required, but it was optional with the prisoner whether he would make the affidavit, or forego the audit of his bill. Verifying it without the purpose of having it presented for audit, would not be an offence.

Third. The administrative officers, referred to in subdivision 3, are those enumerated in title 5 of chapter 5, part 1, of the Revised Statutes, and Mr. Pierce's functions do not bring him within that class, for he was not an administrative officer of any sort, but a clerk only in the office of the engineer.

We are satisfied that the indictment is not sufficient, and for that reason the conviction must be reversed ; and, as no conviction can legally be had upon it the prisoner must be absolutely discharged. (2 R. S., 741, § 24.)

Present — MULLIN, P.J., SMITH and GILBERT, JJ.

Judgment reversed, and prisoner discharged.

COURT OF APPEALS.

NEW YORK, 1876.

LOOMIS ET AL. V. THE PEOPLE.

The accused were convicted of the crime of larceny. They were indicted for stealing from one Christian Olason, the sum of ninety dollars.

On the trial it was shown that Olason the complainant, and the prisoners, were passengers on the same train ; that Lewis, one of the prisoners, engaged Olason in conversation soon after the train started and continued in his company until they reached New York ; that on arriving there, at Lewis' suggestion they went to a hotel, where he and Olason left their valises and Olason left also a box ; at the instance of Lewis they went for a walk, and during the walk he informed Olason that he had a check for \$500 which he wished cashed, and went to a building which he called a bank. The bank he said was not open and they took another walk and went into a saloon, where they found Loomis. Lewis asked for two cigars and offered

a five dollar bill in payment. The bartender could not change it, when the prisoners, Lewis and Loomis, threw dice to see who should pay for the cigars, and Lewis lost. They then threw dice for five dollars and Loomis lost. Lewis offered to divide with Olason, but he said he would have nothing to do with it. Loomis then put up \$100 as a bet, and, Lewis having but \$10, asked Olason for ninety more so that he could make the bet, saying "I am sure to beat him again, and you can have your money back. If I do lose I have got the check for \$500, and we will go to the bank and get the check cashed, and you can have the money." Upon this Olason let Lewis have \$90. The money was won by Loomis. Olason demanded of Lewis his money. Lewis asked for \$100 more which was refused. Loomis then put up \$100 against what had been represented by Lewis as a check of \$500 and Loomis won. Lewis then said he was not worth a cent, and he and Loomis left the room. Olason saw no more of them until after their arrest. Loomis was searched and a package was found marked on the outside \$500, made up of a one dollar national currency bill, a five dollar bill of the Citizens' Bank, a Confederate States twenty dollar bill and pieces of brown paper inside. There was also found upon him five metal worthless pieces, each representing a twenty dollar coin. On Lewis there was found a pack of three-card monte cards.

The counsel for the accused asked the court to charge the jury that there was not sufficient evidence to warrant a conviction; which was refused and an exception taken.

The court charged the jury: "If you are satisfied from the evidence, beyond any reasonable doubt, that the two prisoners conspired fraudulently and feloniously to obtain the complainant's money and convert it absolutely to their own use without his consent, and that in pursuance of such conspiracy they did feloniously and fraudulently obtain from the complainant the ninety dollars by the means and in the manner and under the circumstances testified to by the complainant with the intention of converting the money absolutely to their own use without his consent and against his will, and that the complainant did not intend to part with his ninety dollars absolutely but only for a short time and only until Lewis could get the check or pretended check cashed, I think you can and ought to convict the prisoners of grand larceny, otherwise that you should acquit the prisoners."

To this charge the counsel for the prisoners duly excepted.

Held, that the prosecutor did not intend to part with the possession or the ownership of the money. It was handed over for a particular purpose, with no intention to loan it, or absolutely to surrender the title.

Held, that the character of the crime depends upon the intention of the parties, and that intention determines the nature of the offence. Where by fraud, conspiracy or artifice, the possession is obtained with a felonious intent, and the title still remains in the owner, larceny is established, but where the title, as well as the possession, is absolutely parted with, the crime is false pretences. The *intention* of the owner to part with his property is the gist and essence of the offence of grand larceny.

William F. Kintzing, for the prisoners.

Benj. K. Phelps, district attorney, for the people.

MILLER, J. The prosecutor was induced to place his money upon a game of hazard upon the assurance of Lewis, one of the prisoners, that he was to win, and he would have his money back, or that in case of loss other money would be procured upon a check which Lewis claimed to have in his possession, and paid in place of that lost.

It is evident that the prisoner Lewis and his confederate Loomis conspired fraudulently and feloniously to procure the money of the prosecutor, and by means of a trick and device succeeded in converting it to their own use. Upon the facts proven, the question to be determined is, whether a case of larceny is established. The jury have found that it was the intention of the prisoners to convert the money without the consent, and against the will of the prosecutor, and that he did not intend to part with his property. I think that the conclusion at which they arrived was abundantly warranted by the evidence, and the conviction of the prisoners can be upheld upon well-established legal grounds.

It is contended that the conviction was erroneous, because the prosecutor voluntarily parted with his money, not expecting to receive back the same bills, but others in their place, and hence the crime was not made out. It must be conceded that, in order to establish the offence of larceny, there must be a trespass, and without this element the offence is not complete. (1 Hawk. Pl. Cr., § 1, p. 108; 2 Russ. on Crimes [5th Am. ed.], 95; *McDonald v. The People*, 43 N. Y., 61; *Hilderbrand v. People*, 56 id., 394.) Even although the owner is induced to part with his property by fraudulent means, yet if he actually intends to part with it, and delivers up possession absolutely, it is not larceny. (*People v. Smith*, 53 N. Y., 111.)

In this case, considering the circumstances, it cannot be deemed, we think, that the prosecutor intended to part with the possession or the ownership of the money. It was handed over for a particular purpose, with no intention to loan it, or absolutely to surrender the title, and it was only in case of its loss that other money was to be procured upon the check, which the prisoner Lewis claimed to have in his possession. The prosecutor then had parted with no absolute right to the same, nor transferred any title to the bills be-

fore the contingency of the loss occurred, and the use of the money was but temporary, and for a specified object. Certainly, when it appeared that no loss had happened, the temporary possession was at an end, and to all intents and purposes the money reverted to the prosecutor. The alleged loss, brought about by the criminal and fraudulent conduct of the prisoners, could not change the title, or in any way transfer the ownership to them. They did not thereby acquire any right, and it cannot seriously be questioned that at this time, if not before, the prosecutor would have been justified in taking the money, forcibly, or could have maintained an action for the recovery of the same identical bills. It was his money, and the conversion of it by the prisoners, before it was won, was without a semblance of lawful authority, and, as the jury have found, with a felonious intent.

It was a clear case of larceny, as marked and significant, in its general features as if the prisoners had wrongfully seized and appropriated it when first produced. The form of throwing the dice was only a cover ; a device and contrivance to conceal the original design, and so long as there was no consent to part with the money, does not change the real character of the crime. While the element of trespass is wanting and the offence is not larceny, where consent is given, and the owner intended to part with his property absolutely, and not merely with a temporary possession of the same, even although such consent was procured by fraud, and the person obtaining it had an *animus furandi*, yet as is well said by a writer upon criminal law :

“It is different where, with the *animus furandi*, a person obtains consent to his temporary possession of property, *and then converts it to his own use*. The act goes farther than the consent, and may be fairly said to be against it. Consent to deliver the temporary possession is not consent to deliver the property in a thing, and if a person, *animus furandi*, avail himself of a temporary possession for a specific purpose, obtained by consent to convert the property in the thing to himself and defraud the owner thereof, he certainly has not the consent of the owner. He is, therefore, acting against the will of the owner, and is a trespasser, because a trespass upon the property of another is

only doing some act upon that property against the will of the owner."

In the case at bar there was no valid agreement to part with the money absolutely, and no consent to divest the owner of his title. It was passed over for a mere temporary use at most, and the legal title remaining in the owner, the conversion of it by the prisoners within the rule cited was larceny. The reports are full of familiar illustrations of this rule, as a reference to some of the leading cases will show.

In *Hildebrand v. The People* (*supra*), a fifty-dollar bill delivered to the prisoner to pay ten cents and return the change, was kept by him, and it was held to be larceny. It was intended that after taking out the ten cents other money should be exchanged, and to this extent and for this purpose the prisoner had lawful possession of the money. In that case, as here, the money was not absolutely parted with, but surrendered for a specific purpose and the custody temporarily transferred. It is true that in the case last cited, the delivery was held not to be complete until the change was returned, but that does not alter the principle when there was but a temporary possession as there was no transfer of the ownership. (See, also, *McDonald v. The People*, *supra*.) Nor does it change the aspect of the case, where by trick or device the owner is induced to part with the custody or naked possession of property for special purpose to one who receives it *animus furandi*; and still means to retain a right of property. (*Smith v. The People*, 53 N. Y., 111.) In *Rex v. Horner* (1 Leach, 305), where the prosecutor was decoyed into a public house and money obtained from him for the purpose of playing at cards, and appropriated by the prisoner, it was held that if there was a preconcerted plan to obtain the money, and an *animus furandi*, it was felonious. This case is analogous and directly in point, and it is difficult to draw any distinction between the case cited and the case at bar, as there was quite as strong ground for finding the felonious intent in the latter case as in that cited. In *Rex v. Robson* (R. & R., C. C., 413), where there was a plan to cheat the prosecutor out of his property under color of a bet, and he parted with the possession only to deposit it as a stake with one of the confederates, the taking was held to be felonious. This

case is directly in point, and as a decision by the twelve judges is entitled to great weight. The cases referred to without citing others which bear in the same direction are sufficient to sustain the conviction, and the cases which have been cited as upholding the principle that there was no such parting with the property as to constitute larceny, do not, I think, go to the extent which is claimed. After a careful examination, without considering them in detail, suffice it to say, that perhaps a single exception (*Reg. v. Thomas*, 9 C. & P., 744), which was a *nisi prius* decision, and is criticised in the opinion in *Hildebrand v. The People*, they are all clearly distinguishable from the case now considered, and the weight of authority is decidedly in an opposite direction.

There is, to be sure, a narrow margin between a case of larceny, and one where the property has been obtained by false pretences. The distinction is a very nice one, but still very important. The character of the crime depends upon the intention of the parties, and that intention determines the nature of the offence. In the former case, where by fraud, conspiracy or artifice, the possession is obtained with a felonious design, and the title still remains in the owner, larceny is established. While in the latter, where title, as well as possession, is absolutely parted with, the crime is false pretences. It will be observed that the *intention* of the owner to part with his property is the gist and essence of the offence of larceny, and the vital point upon which the crime hinges, and is to be determined. Although the present case is on the border line, yet it is quite clear that it was, as the evidence stood, a fair question for the jury to decide as to the intent of the prisoners feloniously to take the money, and as to the intention of the prosecutor to part with the ownership of the same.

These questions were fairly submitted by the judge to their consideration, and as there was no error in the charge, or in any other respect on the trial, the conviction must be affirmed.

All concur ; RAPALLO, J., absent.

Judgment affirmed.

COURT OF APPEALS.

NEW YORK, 1875.

RAU V. THE PEOPLE.

The accused was indicted and tried, by the Court of Sessions of Monroe county, for a misdemeanor in having sold intoxicating liquors and wines on Sunday, contrary to the provisions of the Laws of 1857, as amended by § 5, of chapter 549, of the Laws of 1873. On the trial the accused admitted that, on the days charged in the indictment, he sold lager beer by the glass as a beverage, pleading a license under the excise law.

The testimony on the part of the people, tended to prove that lager beer was intoxicating.

The judge charged the jury that, if they found lager beer to be intoxicating, they should convict the accused. To this charge the counsel for the accused excepted. The jury found the defendant guilty.

Held, that the claim of the accused, that the sale of lager beer on Sunday is not prohibited by the excise law of 1857, as amended in 1873, is not tenable. The plain and obvious intention of the section is to prohibit the sale of all intoxicating liquors, and when the liquors are not such as are known to the courts to be intoxicating, their character as intoxicating or not must be determined, upon competent evidence, as a question of fact.

Held, that the suggestion of the counsel for the accused, that by the omission of the words "ale or beer," in the section under consideration, the legislature manifested an intention to omit from the prohibition lager beer, cannot be upheld by the general rule of construing statutes. The main idea of all of the provisions of this act, as evidenced by its title, was "to suppress intemperance, and to regulate the sale of intoxicating liquors," of all kinds. The law should be construed with reference to other laws upon the same subject, and to the mischiefs intended to be remedied. The law was intended to cover all kinds of intoxicating beverages which were within the mischiefs of the law.

William H. Bowman, for the accused.

Angus McDonald, assistant district attorney, for the people.

EARL, J. Rau was indicted in Monroe county, in 1874, for selling intoxicating liquors and wines on Sunday. On the trial he admitted that on the days charged in the indictment he sold lager beer by the glass as a beverage, having a license under the excise law. Evidence was given tending to prove that lager beer was intoxicating, and the judge

charged the jury that if they found it to be intoxicating they should convict the defendant. The defendant excepted to this charge, and the jury found him guilty. It is claimed on his behalf, that the sale of lager beer on Sunday is not prohibited by the excise law of 1857 as amended in 1873. (Laws of 1857, vol. 2, p. 413 ; Laws of 1873, p. 861.)

Section 21 of the Laws of 1857, as amended, provides, that "no inn, tavern or hotel-keeper, or other person, shall sell or give away intoxicating liquors or wines on Sunday." The question is, whether lager beer is included in the words "intoxicating liquors." As to such well known beverages as whisky, brandy, gin, ale and strong beer, the courts without proof, acting upon their own knowledge derived from observation, will take notice that they are intoxicating, and will, therefore, require no proof of the fact. (*Nevin v. Ladue*, 3 Denio, 437 ; *The Board, etc., v. Taylor*, 21 N. Y., 173 ; *People v. Wheelock*, 3 Parker Cr. R., 9 ; *Taylor v. People*, 6 id., 347.) But there are, doubtless, intoxicating beverages which are not so well known and of whose character the courts could not take notice, and more intoxicating beverages may yet be discovered. As to all such, when one is charged with selling them in violation of law, there must be proof that they are intoxicating before a conviction can be had. Hitherto the courts have not been willing to take notice that lager beer is intoxicating, but have submitted the question, when controverted, to the jury, to be determined upon the evidence. The plain and obvious intention of the section is to prohibit the sale of all intoxicating liquors, and when the liquors are not such as are known to the courts to be intoxicating, their character as intoxicating or not must be determined, as it was in this case, upon competent evidence as a question of fact.

But it is claimed that because the language used in section 5 of the same act is "strong or spirituous liquors, wines, ale or beer," therefore, by the omission of the words "ale or beer," in the section under consideration, the legislature manifested an intention to omit from the prohibition lager beer. If this claim has any foundation, it must go to the length of striking from the prohibition of section 21 everything that comes under the denomination of ale or beer. That one having a license violates the law by selling beer

upon Sunday was decided in the case of *The People ex rel., etc., v. The Commissioners of Police* (59 N. Y., 92).

It is a general rule of construction that force should be given to all the language used in an act, and a change in language or the omission of words sometimes has great significance. But the omission in this case has little significance, as language in the act of 1857, as will be seen in Judge WELLES' opinion in 21 New York (*supra*), is used without much precision. The main idea of all the provisions, as evidenced by the title, was "to suppress intemperance, and to regulate the sale of intoxicating liquors" of all kinds, and comprehensive language was used so as to cover all kinds of intoxicating beverages which were within the mischiefs of the law. It cannot be supposed that the legislature intended to omit ale and beer from the prohibition, while, by laws which have long been among our statutes, even the sale of meat, fish and milk on Sunday is prohibited after nine o'clock. (1 R. S., 676.) This law should be construed with reference to other laws upon the same subject; and thus construed, giving proper effect to the language used, and proper consideration to the mischiefs intended to be remedied, there can be no doubt of the legislative intention.

I am therefore of opinion that in the portion of the charge complained of there was no error. I have examined the other exceptions to which our attention was called upon the argument, and it is sufficient to say of them that they are so clearly groundless as to need no consideration here.

The judgment should be affirmed.

All concur.

Judgment affirmed.

COURT OF APPEALS.

NEW YORK, 1876.

CARPENTER v. THE PEOPLE.

The accused was convicted of burglary in the third degree, by the Court of General Sessions in and for the city and county of New York.

Before the grand jury, by whom the accused was indicted, was sworn, his counsel interposed a challenge to the array, on the grounds that Douglas Taylor, who was legally elected and who qualified as commissioner of jurors did not select the grand jury nor was such jury selected by any one authorized by him ; that they were illegally selected by one Thomas Dunlap, who had been appointed in the place of said Taylor by the Mayor, and that the act of the legislature, under which the Mayor acted, was unconstitutional, to which the district attorney demurred, and the demurrer was sustained. On the trial the counsel for the prisoner challenged the array of the petit jurors upon the same grounds. This challenge was demurred to, and the demurrer sustained.

Held, that the challenge to the array of grand jurors was properly disallowed. The Revised Statutes do not allow such a challenge.

Held also, that the challenge to the array of petit jurors was properly disallowed. On the face of the challenge it appeared Thomas Dunlap who selected the petit jurors had been appointed commissioner of jurors and was, therefore, a *de facto* officer.

Held further, that the validity of the appointment of Dunlap could not be drawn in question in this collateral manner.

RAPALLO, J. The challenge to the array of grand jurors was properly disallowed. Under the provisions of 2 Revised Statutes (p. 724, §§ 27, 28) no such challenge can be allowed.

The challenge to the array of petit jurors is founded wholly upon the allegation that the jurors were not selected by Douglas Taylor, the commissioner of jurors of the county of New York, and that he did not, nor did any person on his behalf, attend the drawing of such jurors.

But it is also stated in the challenge, that the jurors were selected by Thomas Dunlap, who had been appointed by the Mayor of the city such commissioner of jurors. That the Mayor exercised a pretended right to appoint Dunlap, but that the act of the legislature under which the Mayor appointed him was unconstitutional.

It thus appears upon the face of the challenge, that the person who acted as commissioner of jurors had been ap-

pointed to that office by the Mayor of the city of New York, in pursuance of an act of the legislature, and that, under color of that appointment, he assumed to and did exercise the functions of the office. He was, therefore, a *de facto* officer, whose acts were valid as to the public, so long as he continued to occupy and exercise the functions of his office; and the validity of his appointment could not be drawn in question in this collateral manner.

The demurrer to the challenge was, therefore, properly sustained.

The judgment must be affirmed.

All concur.

Judgment affirmed.

COURT OF APPEALS.

NEW YORK, 1875.

THE PEOPLE V. SHAW.

The accused was charged with the murder of his wife by administering to her corrosive sublimate. The prisoner was tried by a Court of Oyer and Terminer. At the commencement of the trial, there were upon the bench a justice of the Supreme Court, Hon. *A. D. Waite*, county judge of Washington county, and two justices of the Sessions, *Lyle* and *Steere*. After several days of session, *Justice Steere* left the court and did not return until two days after. After the charge to the jury had been delivered by the presiding judge, *Judge Waite* left the court and was not present when the jury came in and rendered their verdict.

Held, that when *Justice Steere* left, a competent court remained, but his absence for a day disqualified him from further sitting on that trial.

Held, further, that *Judge Waite* having left the court there remained but two qualified members, the presiding judge and *Justice Lyle*. They did not constitute a legal court.

James Gibson, for the people.

D. M. Westfall, for the defendant.

RAPALLO, J. We are of opinion that, for the reasons assigned by HARDIN, J., at General Term, the conviction in this case was properly reversed. We concur in his conclusion that the participation of *Justice STEERE* in the trial,

after his absence from the court for an entire day, was error. But we cannot fail to observe that the proceedings which resulted in the sentence of the prisoner are subject to the further fatal objection, that the verdict of the jury was not received by a legally constituted court. The judiciary act (Laws of 1847, chap. 280, § 38) prescribes that, except in the city and county of New York, Courts of Oyer and Terminer shall be composed of a justice of the Supreme Court, who shall preside, the county judge, and the justices of the peace designated as members of the Court of Sessions; and that the presiding justice and any two of the other officers above mentioned shall have power to hold said courts. It is clear that under this statute a Court of Oyer and Terminer cannot be held except by a justice of the Supreme Court, and at least two of the other officers mentioned in the act.

The court before which the prisoner was tried consisted, at the beginning of the trial, of a justice of the Supreme Court, who presided, the Hon. A. D. WAITE, county judge of Washington county, and two Session Justices, LYLE and STEERE. After the trial had progressed several days Justice STEERE absented himself from the court for an entire day, during which the trial proceeded and evidence was taken. A competent court, however, remained, and if Justice STEERE had not returned, and the others had continued to the end, the present difficulty would have been avoided. But he did return and takes part in the subsequent proceedings. This the General Term decided, for the very cogent reasons, and upon the authorities (except *Doran v. The People*, 2 S. C. R., 558, reversed in this court) stated by Judge HARDIN, was error. Justice STEERE had, by his absence during a material part of the trial, disqualified himself from further sitting as a member of the court on that trial. Consequently the only members authorized to sit were those who had remained throughout the trial, viz., the presiding justice, Judge WAITE and Justice LYLE. After the charge to the jury had been delivered by the presiding justice, but before the rendition of the verdict Judge WAITE left the court, and did not return, and when the jury came in there were present only the presiding justice, and Justice LYLE and Justice STEERE, but, the latter having disqualified himself by his previous absence from taking further part in the pro-

ceedings, the only competent members of the court remaining were the presiding justice and Justice LYLE. That they did not constitute a legal court is plain from the words of the judiciary act before cited, which are, that the presiding justice, and any two of the other officers mentioned, shall have power to hold said courts. This language excludes the idea that any less number possessed such power.

The counsel for the prisoner, before sentence, moved in arrest of judgment, on the ground that no legal court was present to receive the verdict. The point being thus squarely taken, we are constrained to sustain it.

Our conclusion on this branch of the case is decisive of the present writ of error. Other important questions are presented by the bill of exceptions, which may arise on a new trial; some of the declarations of the prisoner's wife, when *in extremis*, were not of such a character as to make them evidence against the prisoner. They were not statements of facts to which a living witness would have been permitted to testify, if placed upon the stand, but the mere expression of belief and suspicions. It is doubtful, however, whether the objection to these declarations was taken in such form as to prevent its true ground. It was a general objection to a general question, as to what she said about the cause of her sickness; no specific objection was taken to the character of the declarations when disclosed. The question objected to might have drawn out a proper answer. But for this difficulty the opinion of COUNTRYMAN, J., at General Term, would conclusively show that, on the ground taken by him, the conviction should have been reversed. The declarations proved, though legally inadmissible, were calculated to seriously prejudice the prisoner before the jury. We are also inclined to think that the evidence was insufficient to connect the prisoner with the bottle found in the toll-house, and that the evidence tending to show that it contained corrosive sublimate was improperly admitted.

We do not deem it necessary to consider the other questions presented, as they may not arise on a new trial.

The judgment of the General Term should be affirmed.

All concur.

Order affirmed.

COURT OF APPEALS.

NEW YORK, 1875.

THE PEOPLE V. POWELL ET AL.

The accused were indicted and convicted of conspiring together to neglect an official duty required by chapter 491 of the Laws of 1871.

The defendants were commissioners of charities of the county of Kings and they were charged with conspiring together in purchasing supplies without awarding a contract therefor, contrary to section 3 of chapter 491, Laws of 1871. They were also charged with official misconduct. Of this charge they were acquitted, and convicted of conspiracy.

The prosecution proved that the defendants purchased in open market and without previous advertisement the articles described in the indictment. Evidence was given by the defendants showing that they did not at the time know of the existence of the statute or that it was their duty to advertise, and that they acted in good faith following the practice theretofore established in the department.

The counsel for the defendants requested the court to charge the jury that they must find a corrupt intent in order to convict the defendants, and, that if they acted in the honest belief that the law did not require them to advertise for proposals, the jury could not convict. This request was not only refused but the judge charged the jury, that ignorance of law, or an absence of an intent to violate it, would not avail the defendants; and if they did the act prohibited, or omitted to do what was required, they were guilty.

Held, that to constitute crime there must not only be the act but also the criminal intention; and these must concur, the latter being equally essential with the former. To make an agreement between two or more persons to do an act innocent in itself a criminal conspiracy, it is not enough that it appears that the act which was the object of the agreement was prohibited. The confederation must be corrupt. The agreement must have been entered into with an evil purpose, as distinguished from a purpose simply to do the act prohibited in ignorance of the prohibition. Mere concert is not conspiracy. The actual criminal intention belongs to the definition of the offence, and must be shown to justify a conviction for conspiracy.

Mr. Moore, for the people.

Benj. F. Tracy, for the defendants.

ANDREWS, J. The defendants, who were commissioners of charities of the county of Kings, were indicted for official misconduct in neglecting to advertise for proposals for sup-

plies for the use of the poor of the county of Kings as required by chapter 491 of the Laws of 1871, and in purchasing supplies without awarding a contract therefor, contrary to the provisions of the act. There were eleven counts in the indictment of this character, each charging the purchase by the defendants, without previous advertisement, of a specific article. The indictment also contained eleven counts for conspiracy, alternating with the counts for official misconduct. Each of the conspiracy counts charged that the defendants "did frequently, maliciously, corruptly and unlawfully conspire, combine, confederate and agree together to omit, refuse and wholly and wilfully neglect" to advertise for proposals for the articles named in the next preceding count for official misconduct. The omission to advertise and the purchase of the article mentioned, without previous advertisement, are the overt acts charged to have been committed in furtherance of the object of the conspiracy.

The statute of 1871, so far as the same is here material to be noticed, is as follows:

"The said board of commissioners shall, from time to time as may be necessary, advertise in the corporation papers of the city of Brooklyn, for not less than ten days, for proposals for all such things as shall be necessary to be used, in and for the relief and support of the poor of the county of Kings; and shall award contracts for the same to the lowest bidder or bidders who shall give adequate security, excepting such perishable articles as are excepted by existing regulations of the superintendents of the poor of the county."

The defendants were acquitted on the counts charging official misconduct, and were convicted of conspiracy. The conviction was reversed by the General Term and the case comes before us on writ of error sued out in behalf of the People.

The court charged the jury that if they should find that the defendants, or any two of them, "entered into an agreement or understanding by which they agreed and conspired that they would advertise for the articles but would continue to take them as they previously had, and that this agreement was afterward carried into execution by the purchase of one or more articles of the description alleged in the

indictment, this was all that was necessary in order to constitute the conspiracy and make the defendants amenable under these charges in the indictment.”

The prosecution proved that the defendants purchased in the open market and without previous advertisement the articles described in the indictment, but evidence was given by the defendants tending to show that they did not at the time know of the existence of the statute or that it was their duty to advertise, and that they acted in good faith following the practice theretofore established in the department. In this position of the case the counsel for the defendants called upon the court to charge the jury that they must find a corrupt intent in order to convict the defendants, and that if they acted in the honest belief that the law did not require them to advertise for proposals the jury could not convict them. The judge refused the instructions asked, but on the contrary, in unambiguous language and in various forms of expression, charged that ignorance of the law, or an absence of an intent to violate it, would not avail the defendants; and if they did the act which was prohibited, or omitted to do what was required, they were guilty. It is quite clear from the record that the learned judge in his charge, and in disposing of the requests to charge, regarded the same rule applicable to the conspiracy counts as to those charging the doing of an act prohibited by the statute of 1871; and intended to hold and charge that the bare agreement between the defendants not to advertise for proposals, followed by conduct and acts in furtherance of the object of the agreement, was a criminal conspiracy and rendered them liable to conviction and punishment, although they supposed they might lawfully purchase without advertisement and were ignorant of the provision of the statute upon the subject. I think this ruling cannot be sustained. The general rule is, that to constitute crime there must not only be the act but also the criminal intention; and these must concur, the latter being equally essential with the former (*GROVER, J., in Stokes v. People*, 53 N. Y., 179), and the intent is to be found by the jury. But where a man is indicted for doing a prohibited act, he will not be allowed to say that he did not know of the

existence of the law he had violated. The offence in cases of acts *mala prohibita*, is complete when the act is intentionally done, irrespective of any actual intention to violate the law. In accordance with this general doctrine it has been recently held in this court, in *The People v. Gardner*, that an honest misconstruction of the law by a public officer, under which he did an act which the court held he was prohibited from doing, was not an excuse for doing the prohibited act. But to make an agreement between two or more persons, to do an act innocent in itself, a criminal conspiracy, it is not enough that it appears that the act which was the object of the agreement was prohibited. The confederation must be corrupt. (3 Greenl. Ev., 75.) The agreement must have been entered into with an evil purpose, as distinguished from a purpose simply to do the act prohibited in ignorance of the prohibition. This is implied in the meaning of the word conspiracy. Mere concert is not conspiracy. Persons who agree to do an act innocent in itself, in good faith and without the use of criminal means, are not converted into conspirators, because it turns out that the contemplated act was prohibited by statute. The actual criminal intention belongs to the definition of the offence, and must be shown to justify a conviction for conspiracy. The offence originally consisted in a combination to convict an innocent person by perversion of the law. (3 Inst., 143; 1 Hawkins, 446, note.) It has since been greatly extended, but I am of opinion that the defendants in agreeing to do an act prohibited by statute, followed by overt acts in furtherance of the agreed purpose, did not conclusively establish that they were guilty of the crime of conspiracy.

It was open for the jury to find, upon evidence, that no criminal intention existed; and if this had been found, to have acquitted the defendants. The argument that they were presumed to know the law and that therefore they intended to violate it, might properly have been urged before the jury; but this presumption was not, in this case, conclusive, and they could not be made conspirators by presumption and intendment, in the absence of any intent to violate the law.

For the errors in the charge upon the point considered, and without considering the other questions in the case, the judgment of the Supreme Court should be affirmed.

All concur.

Judgment affirmed.

COURT OF APPEALS.

NEW YORK, 1876.

DOLAN v. THE PEOPLE.

The prisoner was tried in the Court of Oyer and Terminer of the city and county of New York, and convicted of the crime of murder in the first degree.

There were four counts in the indictment. The first count alleged that the prisoner committed burglary of the store of one James H. Noe with the intent to steal. That during the commission of the burglary he struck said Noe upon the head with a bar of iron, wounding him and of which he died and in that manner committed murder. The second count alleged that the killing was done while the prisoner was committing robbery from the person of the said Noe. The third count alleged that the killing was with the deliberate and premeditated design to effect the death of said deceased. The fourth was the common law count for murder.

The prisoner plead in abatement to the indictment that the grand jury which found the same were not drawn according to law, when the district attorney demurred to the plea, the prisoner's counsel joining, and the plea was overruled.

The counsel for the accused challenged the array of petit jurors, the district attorney demurred to the grounds of this challenge, and it was overruled. The grounds of both challenges are fully set out in the opinion of Judge EARL.

Held; that in the plea there was no allegation of any corruption, dishonesty or unfairness on the part of any of the officers in selecting and drawing the grand jurors, or of any design to injure the defendant or any other person, and it contains no allegation that any of the persons who were upon the grand jury which indicted the defendant did not possess the qualifications of grand jurors, or that any person was upon the jury who would not have been there if all the forms of law which are claimed to have been disregarded, had been strictly complied with. It is not denied that the jurors were selected at the proper time and place. It is not alleged how persons came to be selected whose names were not upon the petit jury lists, nor how many were thus selected. In such a case the whole list cannot be held to be irregular and null, so that none of the persons on it could be drawn for grand jurors, because a few names, without fraud or design, were, by accident or oversight, also put on it.

Held, further, that as there is no allegation in the plea that the drawing was not made by a person acting and claiming the right to act as commissioner, such drawing may have been made by a *de facto* commissioner, and he may have been recognized as such by all the officers who had relations with him or his work. A jury drawn by a *de facto* commissioner would be as regular as one drawn by a *de jure* commissioner.

Held, that there was but one offence charged in the first count, and that was murder while engaged in the commission of the felony described.

Held, that the first count describes a complete burglary and then alleges that the accused committed the murder while engaged in the burglary, not after he had committed it. The offence of burglary is complete when the burglar breaks into a dwelling-house, with the intent to steal, but he may be said to be engaged in the commission of the crime until he leaves the building with his plunder; and if while securing his plunder, he kills any one resisting him, he is guilty of murder under the statute.

Held, that this count is not defective, in that the allegation was that the killing was "wilful and felonious." It is the law that an indictment upon a statute must state all the facts and circumstances which constitute the statute offence, so as to bring the accused perfectly within the provisions of the statute, but it need not contain the words of the statute. It is generally sufficient if it contain the substance and effect of them. The offence is fully described by alleging that the defendant, wilfully and feloniously, killed Noe while he was engaged in the commission of the felony of burglary.

A. Oakley Hall, for the accused.

Benj. K. Phelps, district attorney, for the people.

EARL, J. By the demurrer to the plea in abatement, the following facts must be deemed admitted: That annual panel of grand jurors for the year 1875, for the county of New York, was not wholly selected from the petit jury lists made out by Douglas Taylor, commissioner of jurors, and that that panel, as well as the special panel of grand jurors drawn to serve at the term of court at which the defendant was indicted, contained the names of persons who were not upon the petit jury lists made out by Taylor; that Taylor, who was commissioner of jurors, did not attend upon or supervise the drawing of the grand jurors who were summoned by the sheriff, and from whom the grand jurors who found the indictment were taken; and that he was prevented from attending such drawing, although desirous of so doing, by the duress of the county clerk. It is claimed, on behalf of the defendant, that these facts show that he was not properly indicted, and, therefore, that he was not

properly convicted, and this presents the first question for our consideration.

It will be useful to bring under review the various laws applicable to the city of New York, relating to the selection and drawing of jurors, so that we may see the precise bearing of the defects alleged in the plea demurred to.

Under the Revised Statutes (2 R. S., 412, § 21) it was provided that in the city of New York each ward should be deemed a town for the purpose of returning petit jurors, and that the common council of the city should provide by ordinance the manner in which, and how often, such selection should be made, and the officers and persons by whom it should be conducted. A list of the jurors thus selected was required to be deposited with the county clerk, and he was required to draw thirty-six jurors to attend courts, in the presence of the county judge and sheriff. (§§ 24, 27, 29.) A certified list of the persons thus drawn was to be delivered to the sheriff, and he was to summon the persons thus drawn. In 1830, by chapter 24, section 4 of the laws of that year, the number of jurors to be drawn for any court was not exceeding eighty-four instead of thirty-six, and thus the law as to selecting and drawing petit jurors remained until 1847.

By the Revised Statutes (2 R. S., 720, § 2) it was provided that the mayor, recorder and aldermen of the city of New York should meet in July in each year as a board of supervisors of that city and county, and should prepare a list of the names of 600 persons to serve as grand jurors at the different courts to be held in the city during the then ensuing year, and until new lists should be returned. The list was required to be returned to the county clerk. He was required to put the names in a box and draw therefrom, from time to time, in the presence of the sheriff, county judge or other officers named, twenty-four persons to serve as grand jurors (§ 10), and he was required to deliver a certified list of the names thus drawn to the sheriff, and he was required to summon them. By chapter 332 of the Laws of 1841, the number required to be drawn was changed to thirty-six, and thus the law remained until changed as mentioned below. In 1847 (chap. 495) it was provided that the list of petit jurors should be made by a person to be appointed by the

supervisors of the city, the judges of the Supreme Court and the judges of the Court of Common Pleas, and known as the commissioner of jurors. He was required to make a list of all persons liable to perform jury duty, and return the same to the county clerk. The names thus returned were required by the county clerk to be placed in a box, and he was to draw the jurors, as before provided, to serve at the courts, and the persons thus drawn were to be summoned by the sheriff. In 1853 (chap. 498) it was provided that the persons to serve as grand jurors in the city of New York should be selected from the persons whose names are contained in the list of petit jurors, for the time being, for said city, by a board to consist of the mayor, presiding judge of the Supreme Court, chief justice of the Superior Court, the first judge of the Court of Common Pleas, the recorder and the city judge. They were required to meet annually at the office of the commissioner of jurors on the first Monday of September, and organize by the selection of one of their number as chairman, four of their number constituting a quorum. The commissioner of jurors was required to attend their meeting, act as clerk, and produce to them all the lists of jurors in his possession. They were required to select from these lists a list of not less than 600, nor more than 1,000 persons, to serve as grand jurors in the city until the next list shall be prepared and the names deposited. The list thus selected was required to be certified by the officers making it, and filed in the office of the county clerk. The names upon the list thus made and filed were to be placed in a box by the county clerk, and he was to draw therefrom the names of the persons who were to serve at any court as grand jurors in the manner then provided by law, except that one or more judges of a court of record were required to be present at the drawing and certify the same. The number to be drawn was not changed, and they were to be summoned by the sheriff.

In 1870 (chap. 539) the law was again somewhat changed as to the powers and duties of the commissioner of jurors. The commissioner of jurors was required to commence the preparation of lists of petit jurors in the month of May in each year, and insert therein the names of all persons possessing the qualifications mentioned in the law. The law as

to filing the lists in the county clerk's office, and drawing and summoning petit jurors was left unaltered; and the law as to the selection, certifying and filing of the annual list of not less than 600 nor more than 1,000 grand jurors was left unaltered. Section 28 of that chapter, however, provides that "grand jurors shall be drawn and summoned in the same manner as petit jurors," and that "the ballots shall be prepared by the commissioner of jurors, and after being carefully compared with the lists regularly selected, shall be placed in the grand jury box. Unless the Court of Oyer and Terminer, or the Court of General Sessions, shall otherwise direct, the commissioner shall draw fifty grand jurors for each of said courts on the same day that petit jurors to be impanelled at the same time, shall be drawn." This was the first law which authorized the commissioner of jurors to draw any jury. Before that, both petit and grand jurors were required to be drawn by the county clerk in the presence of the officers named. Such is still the law, except as to the grand jurors, and they are now required to be drawn by the commissioner at the county clerk's office, in the presence of the same officers as before required, and to be certified and summoned as before. Although fifty are required to be drawn and summoned, as a grand jury cannot be composed of more than twenty-three, nor less than sixteen persons, the court must select from those appearing the requisite number and excuse or discharge the rest. (2 R. S., 724.)

The plea contains no allegation of any corruption, dishonesty or unfairness on the part of any of the officers in selecting and drawing the grand jurors, or of any design to injure the defendant or any other person, and it contains no allegation that any of the persons who were upon the grand jury which indicted the defendant did not possess the qualifications of grand jurors, or that any person was upon the jury who would not have been there if all the forms of law which are claimed to have been disregarded had been strictly complied with. It is not apparent how the alleged irregularities harmed the defendant, and it is certain that they had no relation whatever to the question of his guilt or innocence of the crime charged. Under such circumstances the indictment should be upheld, unless the facts pleaded

point out some vital error. A plea in abatement is a dilatory plea, and is it a general rule that it must be strictly construed. The greatest accuracy and precision are required in framing it, and it must be certain to every intent. (1 Chit. Pl., 445, 458; 1 Bishop on Cr. Pro., § 324; *O'Connell v. Regina*, 11 Cl. and Fin., 155; *State v. Bryant*, 10 Yerger, 527; *State v. Newer*, 7 Blackf., 307; *State v. Brooks*, 9 Ala., 1; *Hardin v. State*, 22 Ind., 347.)

There is abundant answer to that portion of the plea alleging that the annual list of grand jurors was not wholly selected from the petit jury lists made out by Taylor as commissioner of jurors. It is not denied that the jurors were selected at the proper time and place. We must assume, as there are no allegations to the contrary, that the board, composed of the mayor and other officers, met on the first Monday of September, 1875, at the office of commissioner of jurors, and organized as required by law; that Taylor was there and produced to them all the petit jury lists then in his office, and they selected mainly from such lists not less than 600 nor more than 1,000 persons who were qualified to serve as jurors. It is not alleged how persons came to be selected whose names were not on the petit jury lists, nor how many were thus selected. It will answer the allegation of the plea to suppose that the number was not more than two or three. No authority can be found holding that in such a case the whole list irregular and null, so that none of the persons on it could be drawn for grand jurors, because a few names, without fraud or design, were, as we may assume, by accident or oversight, also put upon it. From the list of names thus selected the law requires fifty to be drawn and summoned to attend court. This precise number is fixed by the statute for no purpose of benefit or advantage to the persons who may be presented for indictment. The sole object of requiring this number is to secure the attendance at court of a sufficient number to constitute a grand jury. If more or less should be drawn no harm would be done any accused person, provided a sufficient number of qualified jurors were drawn and impanelled. No person who may be complained against before the grand jury can have any part in the selection from the fifty of those who are to constitute the grand jury. The duty of

selecting devolves upon the court. It may select a sufficient number and discharge the rest, and it may determine in its own way what mode shall be used to make the selection from the fifty, and for what reasons any of the fifty may be discharged or excused. Hence, the fact that some one of the fifty may not have been upon the petit jury list made by Taylor, so long as there is no complaint that all the persons actually sworn and impanelled were not upon that list, shows no error of which the defendant could take advantage by plea in abatement or otherwise. (*Ferris v. The People*, 31 How. Pr., 140; *Friery's Case*, 2 Keyes, 424; *Vanhook v. State*, 12 Texas, 252.) Courts do not look with indulgence upon objections to irregularities in the mode of selecting or drawing grand jurors committed without fraud or design, which have not resulted in placing upon any panel disqualified jurors.

But the portion of the plea we are now considering is defective for another reason. It does not give the names of the persons who are alleged to have been selected and drawn, and who were not upon the petit jury lists. This is always required in a plea of abatement when defects of such a character are alleged. Suppose the plea had been that a number of the jurors actually impanelled were not qualified, or that they had not been sworn, a plea setting up such matters for the purpose of quashing the indictment would have to specify the names. In *O'Connell v. Regina* (*supra*) a plea in abatement that certain of the witnesses, upon whose evidence the indictment was found, were not sworn, was held bad upon general demurrer, among other reasons, because the names of the witnesses were not given in the plea. In this case the names should have been given, so that if the district attorney had chosen to join an issue of fact upon the plea he would have known precisely what allegations he would have to meet.

But a more serious allegation of error is the one that Taylor, who was commissioner of jurors, was prevented by duress from attending upon or supervising the drawing of the grand jury for the October term. But here again the allegations of the plea are very meager and deficient. It is admitted that the jury was drawn by some one. The county clerk may be assumed to have been present, as he was re-

quired to draw the petit jury at the same time, and probably, also, to certify the drawing of the grand jury. We must assume that the drawing was at his office; that the other officers required to be present were there; that the ballots were prepared, compared and deposited in the grand jury box by some one acting as commissioner of jurors, and claiming the right to act as such; that his action was recognized by the officers who witnessed and were required to witness the drawing; that the jurors drawn were certified to the sheriff by the proper officer, and were summoned by him; that they appeared and were sworn, impanelled and recognized by the court as the grand jury, without any objection from any one. All these facts must be assumed, as none of them are denied, some of them admitted, and all of them required by the statute.

The plea does not disclose how the jury was drawn, nor by whom. There is no allegation in it that the drawing was not made by a person acting and claiming the right to act as commissioner, and there is no allegation that Taylor acted as such at any time. The allegation as to him is simply that he was commissioner during that year, which allegation is fully satisfied by construing it to mean that he was, *de jure*, commissioner. Consistently with that allegation, therefore, applying the rule of strict construction applicable to such a plea, we may hold upon all the facts above alluded to, that some other person claimed the office and was acting, at least, as a *de facto* commissioner, and that he was recognized as such by all the officers who had relations with him or his work. The maxim *omnia præsumuntur site et solenetur esse acta donec probetur in contrarium* may be invoked against the loose and uncertain allegations of irregularity and error contained in the plea to fortify the conclusion we have reached that the jury, if not drawn by a *de jure* commissioner was, at least, drawn by a *de facto* commissioner. A jury drawn by a *de facto* commissioner would be as regular as one drawn by a *de jure* commissioner. (*Leech's Case*, 9 Howell's State Trials, 358; *Wilcox v. Smith*, 5 Wend., 231; *People v. Cook*, 8 N. Y., 67.) The case of *O'Connell v. Regina* (*supra*) shows how strictly such pleas are construed. There the plea was that the indictment was found upon the evidence of four witnesses, and that the said

witnesses were not sworn and the plea was held bad, among other reasons, because there was no averment in the plea that the bill was not found upon the evidence of other witnesses who were sworn besides those who were alleged to have been examined without being sworn, and because, also, the four witnesses might have been authorized by law to give their evidence upon affirmation instead of upon oath. So there is no averment in this plea that the jury was not drawn by some one who was acting, and claiming the right to act, as commissioner of jurors. In *Leech's Case*, a plea in abatement that the grand jurors were returned by two persons, naming them, who were not sheriffs, was held bad, because the court might infer that the persons named acted as *de facto* sheriffs and were recognized as such.

We therefore conclude that the demurrer to the plea was properly sustained.

It is claimed that the defendant could not be convicted of murder in the first degree under the first count, on the ground that that count was void for duplicity in setting up two distinct offences, a burglary and a homicide in some degree. That count first describes a burglary in the third degree in form so as to show that a complete offence was committed, and then charges that the defendant, while engaged in the commission of the burglary, committed the murder charged. There was but one offence charged, that of killing while engaged in the commission of a felony. (Laws of 1873, chap. 644.) An indictment under that provision of the statute must describe the felony and state, substantially, facts showing that the accused was engaged in the commission thereof. It certainly can do no harm to the accused, and could not mislead him as to the charge he was called upon to answer, that the offence was described more fully or minutely than was necessary. It is obvious that only one offence was designed to be charged in the count, and no one could read it without knowing that the charge was murder while engaged in the commission of the felony described.

It is further claimed that the first count is defective in charging that the killing was committed after the complete offence of burglary had been committed, and not while the accused was engaged in the commission of the burglary.

The count does not bear this construction. It describes a complete burglary and then alleges that the accused committed the murder while engaged in the burglary, not after he had committed it. If a burglar break into a dwelling-house burglariously, with the intent to steal, the offence is doubtless complete before he leaves the building, but he may be said to be engaged in the commission of the crime until he leaves the building with his plunder; and if, while there engaged in securing his plunder, or in any of the acts immediately connected with his crime, he kills any one resisting him, he is guilty of murder under the statute.

Murder in the first degree is described in the act of 1873, as follows: "First. When perpetrated from deliberate and premeditated design to effect the death of the person killed, or of any human being. Second. When perpetrated by an act imminently dangerous to others and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual. Third. When perpetrated without any design to effect death by a person engaged in the commission of any felony." It is further claimed that this count is defective, because it was not alleged therein that the killing was "without any design to effect death," the allegation on the contrary being that the killing was "wilful and felonious." It is undoubted law that an indictment upon a statute must state all the facts and circumstances which constitute the statute offence, so as to bring the accused perfectly within the provisions of the statute, but it need not contain the words of the statute. It is generally sufficient if it contain the substance and effect of them. (*People v. Allen*, 5 Denio, 76; 1 Bish. on Cr. Pro., § 612.)

The Revised Statutes (2 R. S., 546, § 5) contained the same definition of murder as that of murder in the first degree under the statute of 1873, except in the first division of section 5, in the Revised Statutes, the word "deliberate," before "premeditated," was omitted. In 1860 (chap. 410), murder in the first degree was described as follows: "All murder which shall be perpetrated by means of poison or by lying in wait, or by any other kind of wilful, deliberate and premeditated killing, or which shall be committed in the perpetration or the attempt to perpetrate any arson,

rape, robbery or burglary, shall be deemed murder of the first degree." In 1862 (chapter 197), the definition of murder as contained in the Revised Statutes, was applied to murder in the first degree, except that the third subdivision of section 5 was altered to read as follows: "When perpetrated in committing the crime of arson in the first degree."

Under the first subdivision of section 5, in order to constitute murder in the first degree, the killing must have been from deliberate and premeditated design. The object of the third subdivision was clearly in contrast with the first, to make any killing while engaged in the commission of a felony, murder in the same degree, although there was no design to effect death. The sole purpose of the words, "without any design to effect death," was to dispense with proof of any design. It cannot be supposed that the legislature meant to require proof in such a case that the killing was absolutely without any design to effect death, and in case of such proof to make it murder in the first degree, whereas, in case of proof of design to effect death, it meant to make it a homicide in a lower degree. Under the statutes of 1860 and 1862, the particular felonies were described in the commission of which killing would be murder, and under those statutes the killing, with or without design, was murder in the first degree. The only change sought to be effected by the statute of 1873, was to remove the limitation as to the specified felonies, and to make killing murder in the first degree, if done while engaged in the commission of any felony. It would be quite absurd so to construe the statute as to enable a person charged with murder, under the third subdivision of section 5, to establish a defence by proving that he designed the murder. We are, therefore, of opinion that the first count of the indictment fully describes the offence of murder in the first degree by alleging in proper words that the defendant, wilfully and feloniously killed Noe while he was engaged in the commission of the felony of burglary. We have thus, with the care the importance of this case requires, considered and disposed of all the questions which were orally discussed before us. We have also carefully considered all the allegations of error contained in a printed brief submitted to us, and it is sufficient to say of them that they are clearly without founda-

tion, and were sufficiently considered and properly disposed of in the opinions in the Supreme Court.

The judgment must be affirmed.

All concur.

Judgment affirmed.

COURT OF APPEALS.

NEW YORK, 1876.

THOMAS V. THE PEOPLE.

The prisoner was convicted in the court of Oyer and Terminer held in Cayuga County of the crime of murder in the first degree, for killing a fellow prisoner in the Auburn State prison, with a knife.

On the trial one De Witt was called as a juror and, by the prisoner, was challenged for principal cause. He was sworn and testified that he had heard the killing talked about, had expressed an opinion of the affair from what he had heard talked, and then had an impression or opinion as to the guilt or innocence of the prisoner if what he had heard was true; that he thought it would take evidence to remove that impression, and that he would not go into the jury box entirely unbiassed; that the impression depended entirely upon the supposition that what he had heard was true; that if he went into the jury box he would decide the case on the evidence given, and that he believed if he was sworn as a juror he could render an impartial verdict upon the evidence unbiassed or uninfluenced by any impression or opinion which he then had. The court overruled the challenge.

The prisoner then challenged De Witt for favor, and that challenge was overruled. The prisoner's counsel excepted to each ruling. De Witt was then sworn as a juror.

Held, that the challenge for principal cause was properly overruled under the act of 1872.

That act provides that a present opinion or impression in reference to the guilt or innocence of the prisoner, or the expression of such an opinion, shall not be a sufficient ground of challenge for principal cause, provided the person proposed as juror shall declare on oath that he verily believes that he can render an impartial verdict according to the evidence and that such opinion or impression will not bias or influence his verdict, and provided the court shall be satisfied, that the person does not entertain such a present opinion as would influence his verdict as a juror.

Held, further, that this provision has relation to the challenge for principal cause only. The challenge for favor is left unaffected by it.

Held, that the challenge for favor is to determine the indifferency of the person challenged and is to be tried by the court, and such decision is subject to

review the same as other questions arising upon the trial. The court heard the juror testify and was able to judge somewhat from his appearance. He swore that he would decide the case upon the evidence, and that he believed that he could render an impartial verdict upon the evidence, unbiassed and uninfluenced by his impressions. The court properly held the juror indifferent.

The prisoner was permitted to prove threats and acts of violence toward himself, by the deceased, and that the general character of the deceased was bad and, that he was very quarrelsome and vindictive. The accused then offered to prove that before deceased came to the prison, he was engaged in several fights, in each of which he used a knife, and cut his opponent. He also offered to prove the declarations of the deceased in regard to cutting people with razors, and that all these had been communicated to the prisoner. They were excluded by the court and the counsel for the prisoner duly excepted.

Held, that even if the proof given of the general character of the deceased was competent upon the facts of the case, there is no authority for holding that proof of specific acts of violence upon other persons, no part of the *res gestæ*, and in no way connected with the prisoner, was competent.

On the part of the prisoner a witness testified that he heard the deceased say to the prisoner if he ever crossed his path again he would fix him. The accused then offered to show that another person who was present at that time stated to him what the deceased had said on that occasion. This offer was excluded and an exception taken.

Held, that there was no error in the exclusion of the offer. It was an offer to prove a threat which the prisoner had already shown was made to him, and of which, therefore, he had information.

A witness testified that the prisoner, so far as he knew, was a quiet man, and good natured.

The question was then asked : " State what his disposition was when crossed or misused ? " It was properly excluded. It was not competent.

The prisoner was allowed to give evidence of the general bad character of the deceased before he came to the prison ; that he was quarrelsome and vindictive. The prosecution then produced several witnesses who had known the deceased in prison, who testified under objection, that as to quarrelsomeness and vindictiveness, his character was good.

Held, that such evidence was competent. The prisoner had attacked the character of the deceased, and thus raised that issue ; it was, therefore, proper that evidence should be received on the other side. It was competent for witnesses to speak of the character of the deceased where they had become acquainted with it ; the weight to be given to it is another question.

The prisoner's counsel excepted to that part of the charge wherein the judge stated to the jury that the deadly weapon furnished some presumptive evidence and the manner in which it was used, some presumptive evidence of an intent to take life ; and also to that part of the charge which stated that the fact that the prisoner used a deadly weapon and struck a blow at the vital part of the deceased are circumstances which furnish presumptive evidence of an intention to take the life of the deceased.

Held, that the exception was not well taken. The charge related to the fact of killing and the intention to kill. The manner in which the prisoner

plunged the knife into what he knew to be the vital part of the body of the deceased raised the presumption that he intended to take life. The natural result of such an act would be to destroy life, and the law presumes he must have intended the natural consequences of his act.

At the time of the conviction of the prisoner, for murder, he was serving out a term of imprisonment in a State prison, which had not expired. He makes the claim that he could not be hung before the expiration of his term.

Held, that this claim is without foundation. To hold otherwise would give a life convict unlimited license to murder without further punishment. Beside the statute requires, in the case of murder in the first degree, the court to proceed and pass sentence, which must be executed in not less than four nor more than eight weeks thereafter, and whether this law is directory or mandatory, it is the duty of the court to obey it.

John T. Pingree, for the prisoner.

S. E. Payne, for the people.

EARL, J. The plaintiff in error was convicted of murder in the first degree for killing a fellow prisoner in the Auburn State prison with a knife. The prisoner's counsel upon the trial took several exceptions to the rulings to the court, which are presented here as grounds for a reversal of the conviction, and I will examine them separately in the order in which they are presented.

First. Upon the trial George J. De Witt was called as a juror and was challenged by the prisoner for principal cause, and upon being sworn testified that he had heard the killing talked about, had expressed an opinion of the affair from what he had heard talked, and then had an impression or opinion as to the guilt or innocence of the prisoner if what he had heard was true; that he thought it would take evidence to remove that impression and that he would not go into the jury box entirely unbiassed; that the impression depended entirely upon the supposition that what he had heard was true; that if he went into the jury box he would decide the case on the evidence given, and that he believed if he was sworn as a juror he could render an impartial verdict upon the evidence unbiassed or uninfluenced by any impression or opinion which he then had. The court then overruled the challenge. The prisoner then challenged the juror for favor and that challenge was also overruled, and the prisoner's counsel excepted to each ruling and De Witt was then sworn as a juror.

The challenge for principal cause was properly overruled under the act, chapter 475 of the Laws of 1872. That act provides that a present opinion or impression in reference to the guilt or innocence of the prisoner, or the expression of such an opinion, shall not be a sufficient ground of challenge for principal cause, provided the person proposed as a juror shall declare on oath that he verily believes that he can render an impartial verdict according to the evidence and that such opinion or impression will not bias or influence his verdict, and provided the court shall be satisfied that the person does not entertain such a present opinion as would influence his verdict as a juror. This provision has relation only to the challenge for principal cause and removes one of the grounds, therefore, in the cases mentioned. The challenge for favor is left unaffected by that act. Such a challenge is to determine the indifference of the person proposed as a juror, and is now by the act, chapter 427 of the Laws of 1873, to be tried by the court instead of triers as before provided. Before that act the decision of the triers as to indifference was final, and not the subject of review. (*Sanchet v. The People*, 22 N. Y., 147.) But by that act it is provided that *either party* may except to the determination of the court upon the challenge and "upon writ of error or *certiorari*, the court may review any such decision the same as other questions arising upon the trial." What is the effect of this provision? Under the prior law, while the decision of the triers was final, a bill of exceptions would lie to bring up for review any exception taken to the ruling of the court in reference to such challenge or the admission or exclusion of evidence before the triers. (*People v. Rathbun*, 21 Wend., 509; *Sanchet v. People*, *supra*.) This provision was not therefore intended for such exceptions, but manifestly to give the court upon writ of error or *certiorari* the power to review the decision of the trial court upon the question of indifference, a power not before possessed. After the previous act as to the challenge for principal cause, it was doubtless deemed important that the courts of review should possess this additional power. We have therefore, the same power to pass upon the question involved in the challenge for favor which the trial court had, and the question to be determined is, was the juror indifferent

within the rule of law applicable to such a case? He had heard the matter talked about and had an impression or opinion as to the guilt or innocence of the prisoner. That impression or opinion depended upon the truth of what he had heard; and he testified that he would decide the case upon the evidence, and that he believed that he could render an impartial verdict upon the evidence, unbiased and uninfluenced by his impressions. Upon such a state of facts, the court properly held the juror indifferent. At least we cannot say that the court having the juror in its presence, and able to judge somewhat from his appearance, erred in its decision. He had an opinion which depended upon the truth of what he had heard. As a juror he was to find the truth of the case, and such an opinion as he had would in no way interfere with his impartial search after it. The exclusion of a juror in such a case, in these days of general intelligence and newspaper circulation, would render it impracticable in many cases to obtain a competent jury for the trial of persons charged with flagrant and notorious crimes. (*The People v. Honeyman*, 3 Denio, 121; *Lohman v. The People*, 1 N. Y., 379.)

Second. Upon the trial the prisoner was permitted to prove threats and acts of violence toward himself by the deceased, and also to prove that the general character of the deceased was bad; that he was very quarrelsome and vindictive. He offered to prove, also, that before he came to the prison, the deceased was engaged in several fights with other parties, in each of which he used a knife, and cut his opponent; also his declarations about cutting people with razors, and that all these matters had been communicated to the prisoner. These offers were overruled, and this is now complained of as error. Even if the proof given of the general character of the deceased was competent upon the facts of this case, there is no authority for holding that proof of specific acts of violence upon other persons, no part of the *res gestæ*, and in no way connected with the prisoner, was competent. Such proof was held to be incompetent in *Eggle v. The People* (56 N. Y., 642).

Third. A witness on the part of the prisoner testified that he heard the deceased in an angry dispute say to the prisoner that if ever he crossed his path again, he would fix him.

The prisoner then offered to show that a few days afterward the witness heard another person, who was present when the threat was made, state to the prisoner what the deceased had threatened on that occasion to do. The offer was excluded. It is difficult to perceive how it could be important to prove the repetition to the prisoner of a threat which was made in his presence, to him, and of which, therefore, he had information. There was no suggestion that the prisoner did not hear the threat when made, or that he had forgotten it. There was no error in the exclusion of the offer.

Fourth. After a witness had been permitted to testify that the prisoner was a quiet man, and good natured so far as he knew, he was asked the following question :

“State what his disposition was when crossed or misused ?”

This question was properly excluded. No ground was stated at the time upon which it was claimed to be competent, and it is impossible to perceive any. If the answer had been that he was quarrelsome, it would certainly not have aided him ; if it had been that he was peaceful and submissive, it would have done him no good, as there is no pretence that he was either peaceful or submissive under any provocation he received at the time of the homicide.

Fifth. The prisoner gave evidence tending to show that the general character of the deceased, before he came to the prison, was bad ; that he was very quarrelsome and vindictive. The prosecution then called several witnesses who had known the deceased while he was in prison, and they were allowed to testify, against the objection of the prisoner, that, in respect to quarrelsomeness and vindictiveness, his character, while in prison, was good. The ruling admitting this testimony is complained of as erroneous. The prisoner having attacked the character of the deceased, and thus opened that issue, cannot complain that evidence was received on both sides of it. It matters not that the witnesses had only known the deceased in the prison ; there was a large community there, and a man can have a general character there as well as elsewhere ; and it is just as competent for witnesses to speak of that character there where they have become acquainted with it, as at any other place. The

evidence may not be entitled to much weight, as a very bad man may behave well under compulsion in prison, but there can be no doubt of its competency.

Sixth. The homicide was committed with a case knife which, a few days before, the prisoner had ground to a point. He testified that he knew where the heart was located, and he struck his knife into it. The judge charged the jury, explaining the different degrees of murder, justifiable and excusable homicide and manslaughter, and then, among other things, said to the jury :

“The character of the weapon is one strong circumstance in the case; the procurement and preparation of the weapon would be a strong circumstance if you found it was procured and prepared shortly before this life was taken. The fact that this weapon was a deadly weapon, that it was struck at a vital part of the frame of the deceased, is a circumstance you have a right to consider, and must consider, in determining the character of this act; and I charge you that the fact that this prisoner used a knife, which was in itself a deadly weapon, and that he struck a blow at the vital part of the deceased, are circumstances which furnish presumptive evidence of an intention, at the time, to take the life of the deceased; it does not establish the fact; you might find the contrary, notwithstanding that evidence being in the case, and yet it furnishes presumptive evidence; it is evidence from which such conclusion might be drawn, according as the jury shall find from all the circumstances of the case. The fact that this was a deadly weapon would furnish some presumptive evidence of an intent, at the moment, to take life. The mere use of the deadly weapon would not in itself furnish evidence of a premeditation and deliberate purpose to take the life entertained beforehand.”

The prisoner's counsel excepted to that part of the charge wherein the judge charged that the deadly weapon furnished some presumptive evidence and the manner in which it was used — some presumptive evidence of an intent to take life; and also that part of the charge that the fact that the prisoner used a deadly weapon and struck a blow at the vital part of the deceased are circumstances which furnish presumptive evidence of an intention to take the life of the deceased.

The exception is not well taken. This portion of the charge was simply upon the fact of killing and the intention to kill. The fact that the prisoner plunged this pointed knife into what he knew to be a vital part of the body must raise a presumption that he intended to take life. Its natural result would be to destroy life, and he must be presumed to have intended the natural consequence of his act just as if he had aimed at the heart of the deceased and fired a gun. It was not charged that the evidence was conclusive, but simply that it was presumptive, and it was left to the jury to determine the fact upon the evidence under the charge as given.

Seventh. At the time of his conviction the prisoner was under sentence in the State prison for a term, several years of which were unexpired, and the claim is made that he could not be sentenced to be hung before the expiration of his term. This is a novel claim, and seems to be based upon the idea that a prisoner under sentence has a right to serve out his term. He has no such right. His term of service may be curtailed by legislation or by executive pardon, or he may be turned loose by the courts or the prison officials without violating any of his legal rights.

Convicts, like other persons, are under the protection of the law and are amenable to its penalties. The laws for the punishment of crimes are general and apply to all persons in the State. Provision is made (Laws of 1847, chap. 4) for taking prisoners out of the State prison for trial upon any indictment found against them. In all cases, but such crimes as are punishable with death, there is no practical difficulty, as the sentence in any case may provide that the term shall commence after the expiration of the former term. (1 Bishop on Cr. Law [5th ed.], § 953.) Even in such cases, if the sentence should go into immediate effect, it is not apparent how any right of the prisoner would be violated, or what ground of complaint he would have. It certainly would be no detriment to him if he could serve out both sentences by one imprisonment. But in the case of a conviction for murder in the first degree, the court is required to proceed and pass sentence which must be executed in not less than four and no more than eight weeks thereafter. (2 R. S., 658.) It matters not whether this law is directory

or mandatory. It is the duty of the court to obey it; and it follows that neither the prisoner's rights nor the laws were violated in the sentence passed in this case. To hold otherwise would give a life convict unlimited license to murder without further punishment.

Having thus given this case the careful consideration its grave nature demands the conclusion is reached that the judgment must be affirmed.

All concur; CHURCH, Ch. J., not voting, RAPALLO, J., absent.

Judgment affirmed.

COURT OF APPEALS.

NEW YORK, 1877.

BLAUFUS V. THE PEOPLE.

The prisoner was convicted at a criminal term of the Superior Court of Buffalo of the crime of subornation of perjury. On the trial the people called as a witness one Frederick Vorst. The counsel for the accused objected to any testimony being given by Vorst, on the ground that he had been tried and convicted of the crime of perjury, and that he was made incompetent as a witness by statute.

It was shown by record evidence that Vorst had been indicted and put on trial for perjury; that a jury had found a verdict of guilty against him, and that he was then in custody awaiting sentence upon the verdict. The court allowed Vorst to testify, on the ground that the rendition of a verdict of guilty by the jury did not bring the case within the statute, and that he was not incompetent as a witness until the judgment of the court had pronounced sentence upon him.

Held, that until a person, found guilty of perjury by the verdict of a jury, has received judgment and sentence from the court, he is not incompetent to speak as a witness.

Mr. Kinney, for the prisoner.

D. N. Lockwood, district attorney, for the people.

FOLGER, J. The plaintiff in error was tried at a criminal term of the Superior Court, of the city of Buffalo, for a violation of the statute against the subornation of perjury.

(2 R. S., p. 681, § 3.) The people, to maintain the issue on their behalf, called as a witness one Frederick Vorst. The plaintiff in error objected to any testimony being given by that person, on the ground that he had been tried and convicted of the crime of perjury, and that he was incompetent by statute. The statute relied upon is in these words:

"Every person who shall wilfully and corruptly swear, testify or affirm, falsely * * * shall, upon conviction, be adjudged guilty of perjury, and shall not thereafter be received as a witness, to be sworn in any matter or cause whatever, until the judgment against him be reversed." (2 R. S., p. 681, § 1.)

To sustain this objection it was shown by record evidence that Vorst had been indicted and put on trial for perjury; that a jury had found a verdict of guilty against him and that he was then in custody awaiting sentence upon the verdict. Vorst was however permitted by the court to testify, on the ground that the rendition of a verdict of guilty by the jury did not bring the case within the statute, and that he was not incompetent as a witness until the judgment of the court had pronounced sentence upon him.

We have lately, in civil cases, been called upon to construe statutes of similar import. We have held in them that there was no conviction merely upon the finding of the question of fact, and that there must also be a judgment of the court.

These cases arose under the acts relating to dower, and the forfeiture of it by adultery; (1 R. S., p. 741, § 8; 2 R. S., p. 146, § 38; *Pitts v. Pitts*, 52 N. Y., 593; *Schiffer v. Pruden*, 64 N. Y., 47.) We do not think that it is different under the criminal statutes involved in this case. In ordinary phrase, the meaning of the word *conviction* is, the finding by the jury of a verdict that the accused is guilty. But in legal parlance, it often denotes the final judgment of the court. (2 Darris on Stats. [2d Lon. ed.], 683; *Foster's Case*, 11 Rep., 107; *Keithler v. State*, 10 Sm. & M. [18 Miss.], 192; *Reg. v. Hicks*, 1 Den. Cr. Cas., 84.) It has long been held, though, that whether or not the word means the finding of fact by verdict or otherwise, or the judgment of the court, that to shut a person from the witness box, by reason of his conviction of treason, felony or *crimen falsi*,

his guilt must be shown by a judgment. In *Lee v. Gansel*, Cowp. 3, Ld. MANSFIELD lays it down that "a conviction upon a charge of perjury is not sufficient, unless followed by a judgment. I know of no case," he says, "where a conviction alone has been an objection, because, upon motion on arrest of judgment, it may have been, or may be, quashed." And before that, in *Fitz v. Smallbrook*, 1 Keble, 134; [S. C.] T. Raymond, 32; and *sub nom.*, *Wicks v. Smallbrook*, Sidf., 51; a witness was proffered against whom a jury had found a verdict of guilty of perjury, which by the death of OLIVER the Protector, was kept from judgment. It was held, that he was not thereby rendered incompetent. It is to be queried, however, whether there did not enter into this decision somewhat of the idea that the trial and the verdict being in the time of OLIVER, all things judicial done then were *coram non judice*; "discontinued by the alteration of the government," as it is put in Siderfin. But on the other hand, the case from Keble (*supra*) is cited as authority, in Lofft's edition of an old text book of repute; (Ld. Ch. BARON GILBERT'S Law of Evidence, vol. 1, p. 261.) He thus states the rule:

"An indictment for perjury, and verdict thereon, and no judgment entered, cannot be admitted to weaken the credit of any witness; for if there be no judgment entered, the *allegata* must be supposed defective, and a man cannot be intended to make competent proof upon insufficient *allegata*."

A kindred rule is, that a plea of *autre fois convict* can be proven only by the record; and the indictment, with the finding of the jury, etc., indorsed by the proper officer, is not sufficient, although it appear that no record has been made up; (*Rex v. Bowman*, 6 Car. & P., 99.) This is not a *nisi prius* decision, but has the authority of the court of K. B. But there is authority of a later date than some of those cited, and nearer at home. In *Skinner v. Perst* (1 Ashm., 57), the rule is recognized that a conviction without an attainder does not destroy the competency of a witness. (See also, *Cushman v. Loker*, 2 Mass., 108.) *The People v. Herrick* (13 J. R., 82), is always considered as an authority to this point. *The People v. Whipple* (9 Cowen, 707), is express. So is *Dawley v. The State* (4 Ind., 128).

If the question was new with this case, we should not have doubt but that the witness was competent. The statute, above quoted, itself declares the disability of the witness, and affixes it as a consequence. He "shall not *thereafter* be received as a witness," says the statute. Thereafter what? After that he shall "be adjudged guilty of perjury;" and he shall "be adjudged guilty of perjury," upon conviction of wilfully and corruptly swearing falsely. So that first, according to the statute, comes the conviction; whereupon follows the judgment, of sentence upon the guilty, and *thereafter* he shall not be received as a witness.

The learned counsel for the plaintiff in error contends that there is no difference in meaning between the words "*deemed*" and "*adjudged*," used in the penal enactments of the Revised Statutes, and urges that the word "*adjudged*," in the section under consideration, should be read as if written "*deemed*." It is, perhaps, enough to say that it, in fact, reads "*adjudged*," and that whatever difference there is between the two terms, is in favor of our interpretation of the statute. Moreover, the phrase "*deemed*," is not in its meaning, when used in legislative expression, so much more favorable to the plaintiff in error, as to turn us from our view of the question. To "*damn*" or "*condemn*," is "*to deem, think or judge any one, to be guilty, to be criminal — to give judgment, or sentence, or doom of guilt; to adjudge, or declare the penalty or punishment*" (Rich. Dict., in *voce*, *damn*); and "*judge not, that ye be not judged*," of our New Testament, is "*Nyle ye deme, that ghe be not demed*," of Wicliffe.

There is another peculiarity of the statute against perjury which requires notice and strengthens our view of it. It, unlike many other statutes defining crimes and fixing the punishment, does not lean upon still another statute for the incompetency to testify of those who are adjudged guilty of a violation. (2 R. S., p. 701, § 23.) It, by its own declaration, fixes it that any one "*adjudged guilty of perjury; * * * shall not thereafter be received as a witness, to be sworn in any matter or cause whatever, until judgment against him be reversed.*" (2 R. S., 681, § 1.) The person adjudged guilty may not be restored to competency by pardon, as inability is not a consequence, but a part, of the

judgment (*Rex v. Crosby*, 2 Salk., 689; *Holdridge v. Gillespie*, J. C. R., 30), though it matters not that it be not in fact made a formal part of the judgment. (1 Greenl. Ev., § 378, n. 1.) But to restore to competency the *judgment* must be reversed, not the conviction, if the conviction be no more than the verdict. If the plaintiff in error be correct, there might be the painful position of a verdict of guilty (a conviction, as he would claim, which would render incompetent to testify), and no judgment entered, to reverse which writ of error could be brought, so that competency could be restored. We are aware that the Revised Statutes are provident for the accused person, that the district attorney and the clerk shall make up a record of judgment and enter the same upon the minutes. (2 R. S., p. 738, §§ 4, *et seq.*) Yet it seems that that which is to be reversed to restore competency, is that which unreversed alone creates incompetency.

Again, when the statute law undertakes, by general provision, to affix incompetency to testify to persons guilty of certain offences, it says: "No person *sentenced* upon a conviction for felony shall be competent to testify," etc. (2 R. S., p. 701, § 25.) We see no reason why one guilty of perjury should be made incapable before sentence rather than one guilty of other felony; more especially as we find in the perjury statute the phrase, "shall, upon conviction be adjudged guilty of perjury," which is tantamount to the other one of "sentenced upon a conviction for felony."

We are brought to the conclusion that, although the word conviction is not always used in the books to express the same idea or judicial act, yet that its use in the enactment under consideration is not enough to overcome the authorities which we have cited, and that the considerations urged for the plaintiff in error from other acts are not enough to convince us of error in the courts below.

We are of the opinion that until a person, found guilty of perjury by the verdict of a jury, has received judgment and sentence from the court, he is not incompetent to speak as a witness.

The judgment must, therefore, be affirmed.

All concur.

Judgment affirmed.

NOTE.—The statute considered by Judge Folger in his opinion, has been repealed, and section seven hundred and fourteen of the Penal Code substituted. That section reads as follows :

“§ 714. A person heretofore or hereafter convicted of any crime is, notwithstanding, a competent witness in any cause or proceeding, civil or criminal, but the conviction may be proved for the purpose of affecting the weight of his testimony, either by the record, or by his cross-examination, upon which he must answer any proper question relevant to that inquiry; and the party cross-examining is not concluded by the answer to such question.”

See *People v. McGloin*, 1 N. Y. Crim. Rep., 105.

ED.

COURT OF APPEALS.

NEW YORK, 1877.

FILKINS v. THE PEOPLE.

The accused was convicted of a felonious assault upon one Taylor, with a pitchfork, a sharp, dangerous weapon. The offence alleged was created by chapter 74, of the Laws of 1854.

It appeared on the trial that a controversy existed between Filkins, the accused, and one Carpenter in respect to several mules. Filkins claimed them in right of, and as agent or bailee of his wife, the general owner. Carpenter claiming a lien upon them for their keeping. Filkins was the tenant in possession of the premises, and thus in actual possession of the mules. The mules had been kept by Carpenter, under an agreement with Filkins, and there were several hundred dollars due in arrears for their keeping. At the time of the affray, during which the alleged assault was made upon Taylor, Carpenter had, in the absence of Filkins, gone to the barn with men and boys, including Taylor, with the intention of taking possession of and removing the mules by force. Filkins came upon the ground and discovering what was being done opposed force by force, and the assault alleged was the result. Filkins found Taylor in the act of taking one of the mules from the stall, and with a pitchfork which he had in his hand struck him twice on or over the head. The blow was made as with a club and not by pushing or thrusting with the tines.

Held, that as used the weapon was not a sharp and dangerous one, and not within the statute.

On the trial the accused offered to prove the ownership and his possession of the mules. The evidence was excluded. It was further offered by the accused, to prove that Carpenter with the complainant were trespassing, and that the accused was only endeavoring to protect his property. The court rejected the offer. The judge was asked if he still persisted in his

ruling out evidence of the ownership of the property, to show a right to resist, and a justification in the use of force, and he replied that he did persist in so ruling. To each of these rulings and decisions there was a distinct and several exception.

Held, that in the exclusion of this evidence, there was manifest error. The right of property and to the possession of the mules was at the foundation of a justification or excuse for any assault, or the resort to any violence or force to prevent their removal. The assault upon Taylor was professedly in defence of property, and the affray grew out of the rival claims of the contestants. The proof offered was competent to enable the jury to determine who was the aggressor, and whether the force used was justified. If the intention was merely to defend the possession of the goods, and there was no malicious intent, the offence was not within the statute of 1854.

Albert D. Lanning, for the prisoner.

D. N. Lockwood, district attorney, for the people.

ALLEN, J. The plaintiff in error was convicted in the Superior Court of the city of Buffalo, of a felonious assault upon one Taylor with "a pitchfork, a sharp, dangerous weapon," without justifiable or excusable cause, and with intent to do bodily harm to said Taylor. The offence for which he was indicted was created by chapter 74 of the Laws of 1854, and a conviction can only be had upon proof of the concurrence of the several facts of which the crime is made to consist.

(1.) An assault ;

(2.) The absence of any justifiable or excusable cause for the assault ;

(3.) That the assault was with a "knife, dirk, dagger or other sharp, dangerous weapon ;" and,

(4.) That it was made "with intent to do bodily harm."

Any evidence that goes to disprove any one of the facts which enter into and make a part of the statutory crime is competent and should be admitted. Under an indictment for the aggravated assault and battery, which is made a felony by the statute, the party indicted may, upon proof of "justifiable or excusable cause," be acquitted altogether, or if a legal justification for the use of moderate and reasonable force is shown, but excessive violence has been done, he may be convicted of an assault and battery by reason of the excessive force ; or if the assault be proved and there be no justification, but the intent to do bodily harm is nega-

tived, or the weapon is not one of those named in the statute, the offence will be reduced to a misdemeanor—a simple assault and battery. Any evidence legitimately tending to justify or excuse the assault, or to show that it was not made with the particular malicious intent charged, was competent, as the question of fact upon either defence would have been for the jury.

It appeared upon the trial that a controversy existed between the accused and one Carpenter in respect to some fifty mules, the latter claiming a lien upon them for their keeping, and the former claiming them in right of, and as the agent or bailee of his wife, the general owner.

At the time of the alleged assault they were in a barn owned by one Rogers, and in that half of it which there was evidence to prove had been rented by Filkins, and although Carpenter testified that he had, in his own name, rented one half of the barn from the owner, there can be but little doubt that Filkins was the tenant in possession of the premises, and thus in actual possession of the mules.

There was also evidence that the mules had been kept by Carpenter, under some agreement with Filkins, and that there were several hundred dollars due and in arrears for their heeping. Upon the occasion of the affray, during which the alleged assault was made upon Taylor, Carpenter had, in the absence of Filkins, gone to the barn with a number of men and boys, including Taylor, prepared and intending to take possession of and remove the mules by force and with a strong hand. He was accompanied by several members of the police force of the city of Buffalo, in and out of uniform, who, it would seem from their actions, were present, not as conservators of the peace, but in the interest of Carpenter, and to arrest any that might interfere with or hinder him in getting possession of the mules.

The attempt of Carpenter, and those aiding and assisting him, tended to a breach of the peace, and led naturally and directly to the affray which ensued and in which, if Filkins had the legal right to the possession of the mules, they were the aggressors.

On the coming of Filkins upon the ground, and discovering what was being done by a multitude, and with force, he

opposed force to force to retain the property, and the assault upon Taylor was the result.

He (Filkins) saw that several of the mules had been taken out of the barn and were being led away, and sought to prevent the removal of the residue, but with the aid of a single man, and against the force opposed to him, was unable to close the barn. He found Taylor in the act of taking one of the mules from the stall, and with a pitchfork which he had in his hand struck him twice on or over the head.

The assault was by a blow, as with a stick or club, and not by pushing or thrusting with the tines.

As used, the weapon was no more dangerous than it would have been if there had been buttons on the tines to prevent their puncturing the flesh, or than would have been a knife held by the blade, the holder striking with the handle.

A blow thus given with the handle of a knife would not be an assault with a knife or sharp instrument, within the statute, any more than would an attempt to discharge a loaded gun, the touch-hole of which was plugged, be an offence under the English statute making it criminal to attempt to discharge a loaded gun at another. (*Rex v. Harris*, 5 C. & P., 159; 1 Russ. on Cr., 979; marg., 725.)

In the progress of the trial the accused proposed to prove the ownership and possession of the mules, and that he was justified in using force to retain them. The evidence was excluded, the judge ruling that it was not material whether the accused had possession of the animals, or whether reasonably or unreasonably, justifiably or unjustifiably, Carpenter obtained possession of them. Again, when it was proposed to prove that Carpenter and his men were trespassing, and that the accused was only endeavoring to protect his property, the court declined to go into the question of the right between Carpenter and Filkins. At a still later stage of the trial, the judge was asked if he still persisted in his ruling out evidence of the ownership of the property, to show a right to resist, and a justification in the use of force, he replied that he did persist in so ruling.

To each of these rulings and decisions there was a distinct and several exception.

In the exclusion of this evidence by the learned court, we think there was manifest error. The right of property and

to the possession of the mules was at the foundation of a justification or excuse for any assault, or the resort to any violence or force to prevent their removal. The jury might, had the proof been admitted, and the facts offered to be proved been conclusively established, have convicted the prisoner of an assault and battery in the use of excessive force, or of the felonious assault charged as having been made with the specific intent to do bodily harm, but the weight and effect of the evidence would have been for the jury.

The evidence having been excluded, the accused was without excuse for resistance, and the jury were permitted to infer such intent as the character of the assault without proof of any justifiable or excusable cause authorized. If the possession of the mules by Filkins was rightful either as owner or as the bailee of the owner, and Carpenter was not entitled to the possession in virtue of any lien, then Taylor as a volunteer in aid of Carpenter and others acting with him, was a trespasser, and Filkins could have justified an assault and battery in defence of his possession. Carpenter and his abettors, if without right to the mules, having come forcibly upon the premises to remove the goods of Filkins, the latter could have opposed them with force at once and without a previous request to desist. There was no time to make a request. (*Green v. Goddard*, 2 Salk., 641; *Tullay v. Reed*, 1 C. & P., 296; *Weaver v. Bush*, 8 T. R., 78.)

It is not disputed that a man may justify an assault and battery in defence of his lands or goods, or the goods of another delivered to him to be kept, and whether he resist with greater force than is necessary or than is proportioned to the violence of the trespasser, will be for the jury under proper instructions from the court. (Hawk. P. & C., b. 1, c. 60, § 23; 1 Russ. on Cr., 609, [n.].) The assault upon Taylor by the plaintiff in error was professedly in defence of property to which he asserted title, and the affray grew out of the rival claims of the contestants, and the proof offered was competent to enable the jury to determine who was the aggressor, and whether, to the extent that force might lawfully be used in defence of one's goods, the assault was justified.

The evidence was also competent upon the question of the intent with which the assault was made. The *quo animo* of the attack was material as fixing the grade of the offence. To convict the accused of the aggravated offence created by the statutes of 1854, the act must have been committed by him with the specific, malicious intention, which, under the statute, gives character to the act and aggravates the assault. The intent in such cases is a question of fact for the jury, and the malicious intention is to be inferred from the situation of the parties; their acts and declarations; the nature and extent of the violence and the object to be accomplished. If the intention was merely to defend the possession of the goods, and there was no malicious intent, although unjustifiable means may have been resorted to, the offence was not within the statute of 1854. Whenever the degree of the offence depends upon the particular intent with which an act is done, the intent to be inferred from the circumstances is for the jury, and every fact which will throw light upon that question may be given in evidence.

It is only a presumption that a party intends the ordinary and probable consequences of his act, and such presumption may be rebutted by competent evidence. (2 Stark. Cr., 691; *Sinclair's Case*, 2 Lew., 49; *Griffin v. Parsons*, 1 Russ. on Cr., 755, [g.]; *Williams' Case*, 1 Leach, 533; 1 East P. C., 424.) With full proof of legal right in Filkins, as offered, with proof also offered in the same connection and rejected, that the accused was only endeavoring to protect his property, the jury might have negatived the felonious intent charged, or either acquitted him or convicted him of a simple assault and battery, finding that, although bodily harm might have resulted from the assault, it was not made with that intent or to accomplish that object, but with the lawful intent merely of defending his property. Direct proof of the actual intent was substantially included in the offer, and was admissible. (*Kerrains v. People*, 60 N. Y., 221.) The judgment must be reversed, and proceedings remitted for a new trial in the Superior Court of Buffalo.

All concur.

Judgment reversed.

COURT OF APPEALS.

NEW YORK, 1877.

ARMSTRONG v. THE PEOPLE.

The accused was indicted, tried and convicted for the crime of seduction under promise of marriage. There were five counts in the indictment charging the same offence, and the counsel for the accused moved the court to require the district attorney to elect upon which count he would rely for a conviction. The motion was denied and exception taken.

Held, that the motion was properly denied. The indictment in each of its counts alleged but one and the same offence, with such variations of allegations as were prudentially fitted to meet variations in the proof.

The court allowed the prosecutrix, under objection, to swear that her father and mother were both dead and when they died.

Held, that the evidence was not of great importance to the case of the people, but the admission of such testimony was not improper.

The complainant was allowed to testify in regard to a conversation, she said was held in October at the house of Gaylord, after the illicit connection.

Held, that such conversation was part of the *res gesta*. Like any other conversation or declaration of the accused upon the subject-matter, it was competent. The prosecutrix was called from her bed by the accused, late in the evening—this shows intimate and yielding relations on her part—and as to this fact she is supported by other evidence.

The prosecutrix was allowed under objections and exception, to answer the question, "Did you believe him when he had connection with you, that he would marry you?" The answer was: "Yes, sir."

Held, that this allowance of the question was proper. The question at issue was, whether the consent of the prosecutrix was obtained under and by reason of the promise of marriage.

On the trial the prosecutrix testified that the illicit intercourse took place at the house of Dr. Kimball, on August 5th, 1875. She was then asked by the district attorney to go on and state in her own way what occurred on that evening. To this the counsel for the prisoner objected, and the court overruled the objection.

Held, that the evidence was material and admissible. It was of the very gist of the crime alleged, that she was thus directed to speak, and there was no better way, than for her to relate the story of it without prompting or hindrance from questions.

The prosecutrix, on the trial, was permitted by the court, under objection, to testify that she was at that time in a family-way.

Held, that there was no error in this ruling. She being, and having always been, an unmarried woman, the fact of pregnancy was positive proof of illicit connection with some one. It did not fix the accused as a participant therein; but it was a fact in the case, not incompetent to be made known to the jury.

It was urged by the counsel for the accused that the evidence of the prosecutrix was not supported by other evidence.

Held, that it is settled, by the authorities, that the supporting evidence is required as to two of the matters named in the act of 1848, and as to them only. They are the promise of marriage, and the carnal connection. Both these may be determined by the jury from the facts shown on the trial. In this case there was some supporting evidence furnished; it was for the jury to determine its strength.

Mr. Parsons, who had acted as attorney for the prosecutrix, was examined out of court, and his examination offered in evidence. The question put to Mr. Parsons, "whether he obtained from the prosecutrix, the facts stated in a complaint in a suit by her for breach of promise of marriage," was objected to by the people and the witness, that the communication was a privileged one from client to counsel. The complaint was not sworn to nor was it read over to her after it was made out. The court ruled the answer out.

Held, that the ruling was correct.

On the trial the accused and other witnesses testified to an *alibi*, and the court in his charge said to the jury, that if they were satisfied from this evidence that at the time the prosecutrix testified to, the accused was not there, that that fact disposed of her evidence. The court added: "But it is proper for me to remark that, no matter when it"—the illicit intercourse—"did take place, provided it was after the promise of marriage, and the consent, on her part, was in consequence of the promise of marriage."

Held, that as a legal proposition, this cannot be deemed objectionable.

The court charged, and to which exceptions were taken, that if the connection took place after the promise of marriage and in consideration thereof, that it was immaterial whether the promise was made in May or afterward, if it was before the seduction; that the promise might be made and the connection take place afterward, and the crime be committed, if that connection was in consequence of that prior promise; and that the jury, in the opinion of the court, would be justified in finding a promise from her evidence if it was supported, and, that if the promise of marriage was made, as testified to by her, that was sufficient under the statute.

Held, that there was no error in the charge as made.

Church, Ch. J., dissented, on the ground of a want of corroboration as to the intercourse. Corroboration by opportunity and the like may be sufficient, but having fixed time, place and circumstance, if these are not supported by any evidence, but contradicted by all the evidence, the prosecutrix is not sustained or corroborated by proof that intercourse was possible on some other occasion than that testified to by her. The question is not, whether she ought to be credited, but, whether she is supported by other evidence.

W. S. Farwell, for the accused.

F. Brundage, district attorney, for the people.

FOLGER, J. We will consider the points made by the plaintiff in error, *seriatim*.

First. The motion to compel the people to elect on which count of the indictment they would rely, was properly denied.

The indictment, in each of its counts, charged but one and the same offence, with such variations of allegation as were prudentially fitted to meet variations in the proof.

Second. It was not improper to show the time in the life of the prosecutrix, when her father and her mother died, respectively.

It was not of great importance to the case of the people, but it was not improper so to do.

Third. The conversation of Gaylord's was part of the *res gestæ* between her and the plaintiff in error. Like any other conversation or declaration of his upon the subject matter, or bearing upon it, it was competent. That conversation, if it occurred, went to some extent to prove one of the chief elements of the alleged crime. The circumstances in which it took place—the prosecutrix having been called, and arising from her bed to hold it, at an advanced hour of the evening, showed relations between them, more than usually intimate and yielding on her part. As to these facts (save the purport of the conversation had), she is supported by other evidence.

Fourth. The question put to the prosecutrix: "Did you believe him when he had connection with you, that he would marry you?" was proper.

An affirmative answer would tend to make out, one of the important parts of the crime, to wit: That the consent of the prosecutrix to the intercourse, was given, under and by reason of the promise of marriage. A negative answer would have been decisive of the case, in favor of the accused. A like question was sustained, in the case of *Kenyon v. The People* (26 N. Y., 204); and in *Boyce v. The People* (55 N. Y., 644; *S. C.*, ante, 63).

Fifth. The direction to the prosecutrix, to go on and state in her own way, what occurred on the evening of the intercourse, was proper, as was the statement made by her in obedience thereto.

It was of the very gist of the crime alleged, that she was directed to speak, and there was no better way, than for her

to relate the story of it without prompting or hindrance from questions. The evidence was material and admissible.

Sixth. The testimony from the prosecutrix that she was in the family-way at the time of the trial, was not inadmissible and immaterial.

She being, and having always been, an unmarried woman, the fact of pregnancy was positive proof of illicit connection with some one. It did not fix the plaintiff in error as a participant therein; but it was a fact in the case, not incompetent to be made known to the jury.

Seventh. The statute under which the plaintiff in error was indicted, declares that there shall not be a conviction upon the testimony of the female complaining, not supported by other evidence.

It is settled that the supporting evidence is required as to two of the matters in the act, and as to them only. They are the promise of marriage, and the carnal connection. (*Kenyon v. The People*, 26 N. Y., 203; *Boyce v. The People*, 55 N. Y., 644; *S. C.*, ante, 63.) It is settled by the same authorities, that the supporting evidence need be such only as the character of these matters admits of being furnished. The promise of marriage is not an agreement usually made in the presence or with the knowledge of third persons. Hence the supporting evidence possibly in most cases, is the subsequent admission or declaration of the party making it; or the circumstances which usually accompany the existence of an engagement of marriage, such as exclusive attention to the female on the part of the male, the seeking and keeping her society in preference to that of others of her sex, and all those facts of behavior toward her, which before parties to an action were admitted as witnesses in it, were given to a jury as proper matter for their consideration on that issue.

So, too, the act of illicit connection, and the immediate persuasions and inducements which led to compliance, may not be proved by the evidence of third persons directly to the fact. They are to be inferred from the facts; that the man had the opportunities, more or less frequent or continued, of making the advances and the propositions; and that the relation of the parties were such, as that there was likely to be that confidence on the part of the woman in the

asseverations of the devotion on the part of the man, and that affection toward him personally, which would overcome the reluctance on her part, so long instilled as to have become natural, to surrender chastity. (See cases last above cited.)

Circumstances of this kind vary in weight in different cases, and it is for the jury to determine their strength. But, where proof is made of the existence of them, in some degree, it cannot be said that there is no supporting evidence. A court cannot then properly direct a verdict, or discharge the defendant in the indictment, on the ground that no case is made for the consideration of the jury.

In the case in hand, there was evidence of the existence of both these classes of circumstances, furnished by witnesses other than the prosecutrix.

But the question in this case takes a more peculiar nature. It is urged that the prosecutrix, in her testimony, limits the carnal communication to a single act. It is claimed that she specifies with exactness the very time at which that act was committed. Then it is insisted that the supporting evidence must also be confined to that very time. If the premises be conceded, I do not see that the conclusion necessarily follows. It is conceded by the authorities that direct evidence in support, is not capable of production, and that the requirement of supporting is met, when from testimony of other witnesses such opportunities are shown to have existed, and such relations to have been formed, as to make it probable that the act may have been done. Now this general testimony cannot point to any particular time. From its nature it covers all the time of the existence of the facts which it establishes; and whenever during that period, the act is alleged by the testimony of the principal witness to have been accomplished, the supporting evidences attaches to that time, and brings its corroboration to bear upon it. It shows the chances in the hands of the suitor, for the commission of the offence, but it cannot beforehand predict just when he will be able to avail himself of them, nor can it afterwards say just when he did. When these circumstances and relations have been shown, the supporting evidence has been furnished. How great its strength, or how close its applicability to the act as spoken to by the princi-

pal witness, is for the jury to determine. It may be so weak of itself as not to form a basis for a verdict of guilty ; or the details of the illicit act may be so given by the prosecutrix, as to be repugnant to common sense, and impossible of belief, notwithstanding the general supporting evidence ; or she may be so contradicted as not to be credited.

Great stress is laid upon the alleged fact that the woman, in this case, has fixed the single act of intercourse on the evening of a certain day ; and the plaintiff in error, it is alleged, proved himself remote from her on that evening. Hence, it is said, that though he did have opportunity, from time to time, and did have her confidence, it cannot be found that he availed himself thereof. But we must bear in mind the question now in hand. It is, was there such testimony as that the court could suggest to the jury a verdict of acquittal ; and the reason given to us why the court should have done so is, that there was no, or insufficient, supporting testimony. But there was the supporting testimony, which the law is satisfied with — proof of opportunity and confiding freedom of relations. Whether, as a fact, advantage was taken thereof, must still, in some measure, depend upon the testimony of the female. Whether that is to be believed, must depend upon its credibility. If she is so contradicted by positive testimony in rebuttal, or by facts and circumstances, as not to be believed, that is for the jury, and is one thing ; but, whether she be believed or not, does not alter or destroy the supporting evidence. It has met the exaction of the law, and shown the circumstances demanded of it. That, in the midst of opportunities, and with the confidence of affection, the prosecutrix has fixed an impossible or an incredible date for the commission of the act, or has given such details as are incredible, or that she is, from anything in the case so unworthy of credit as to make a verdict of guilty unsafe to render, does not blot out of existence the opportunities and the confidential relations. They remain. The jury cannot reject them, though they may not believe her, and not believing her, may acquit the accused. Thus, it is seen that, in the case claimed by the plaintiff in error to exist, the question was not for the court whether there was not enough of supporting evidence. It was for the jury, whether the story of

the female, of facts alleged to have occurred in the circumstances established by the supporting evidence, whether that story was credible. But the case does not rest altogether on such a state of facts as is above supposed. In the first place, the prosecutrix does not, in her testimony, limit the sexual intercourse between them to one act thereof. She speaks affirmatively of only one. She does not affirm that there was no other. Nor was it so conclusively shown that the plaintiff in error was not at the place named by the prosecutrix on the night named by her, as that there was no question for the jury. She says that he was. He says that he was not. These two are the positive and direct witnesses. Mrs. Kimball and her husband do not fix with certainty the night or nights on which he was at their house. The husband, indeed, stated that it was his impression that plaintiff in error was there on the night of the first Thursday in August, the day named by the prosecutrix. Witnesses show the plaintiff in error on that day entering the lodge-room about 8 o'clock in the evening, which was in the same village with the house of Dr. Kimball, witnesses show him leaving it at between 9 and 10 o'clock of that evening. It was between 9 and 10 that evening that the prosecutrix says that he came to Kimball's front door. The plaintiff in error says that he went from the lodge-room toward his house, in company with three persons, whom he names, who walked with him three-fourths of a mile from the village, where they sat down by the road-side and talked of lodge matters. Neither of these three persons is called to sustain the plaintiff in error, though it appears that one, at least, of them was, at the time of the trial, still residing there, and it is to be inferred that one other was also. It cannot be admitted, in view of such a state of the testimony, that it was demonstrated that the prosecutrix was in error in the night she named. At most, there was a conflict of evidence, most sharply between her and the plaintiff in error; and it cannot be said that he, more than she, is sustained by the other testimony. It was a fair question for the jury, on their judgment of the credibility of each of them, as made up from the incidents of the trial, which of them should be believed. Hence, the court made no error in refusing to direct an acquittal.

Eighth. Mr. Parsons, the attorney for the prosecutrix, was examined out of court. The question was put to him by the plaintiff in error, whether he obtained from the prosecutrix, the facts stated in a complaint in a suit by her for breach of promise of marriage. It was objected by the counsel for the people and by the witness Parsons, that the communication was a privileged one from client to counsel. The complaint was not sworn to, nor was it read over to her after it was made out. These latter facts appeared to the court, before it passed upon the objection to allowing the answer to that question to be read. We think that it was right in ruling out the answer.

Ninth. The plaintiff in error asked the prosecutrix whether she had not sworn before Esquire Dox to a statement at the time the question was put, read to her from what is conceded was an affidavit made by her. The question was overruled, and an exception taken.

We do not perceive the materiality of the question. The statement was nearly in precise accord with her narration of the same circumstances made both on her direct and cross-examination, so that it would not have furnished a contradiction of her, if it had been permitted. The prosecutrix had been recalled by the district attorney, and had testified that she recollected another occasion of the plaintiff in error being at the house at which she lived, an occasion testified to by Mrs. Kimball, in whose family she was employed. It is urged, that pressed by the rebutting and contradicting testimony, which the plaintiff in error had given, the district attorney saw the need, of presenting for the consideration of the jury another occasion than that testified to by her, on which the carnal connection might have taken place. This contention seems too strained. There is no claim or pretence in her testimony, when recalled, that the connection was on that occasion. It does not appear that it was urged to the jury, or in any way claimed by the district attorney, that it took place at that time. Besides, there was a purpose, for which it was probably offered. The plaintiff in error had testified that, on the occasion named by Mrs. Kimball in her evidence, he had been at her house in the evening; that he went at about 9 o'clock, and met the prosecutrix at the front door; stayed

there about fifteen minutes ; then went into the sitting room, and remained there in conversation with Mrs. Kimball until about 11 o'clock, and did not remain at the house after that conversation. There was a pertinency to this testimony from the plaintiff in error. He was then attempting to show that there had been, before that time, growing up a coolness between him and the prosecutrix on account of her conduct, of which he did not approve, and which he had reprehended. This allegation that he did not remain with her but about fifteen minutes, though he stayed in the house near two hours, had a bearing upon that issue. Hence, it was pertinent to show, that he was in error in his statement. The prosecutrix seems to have been recalled for that purpose, and that seems the only legitimate effect of her testimony there given. She testified that after he left Mrs. Kimball's room he remained in the front hall with her over an hour, before he left for home. This being the legitimate effect of that testimony, and no other having been claimed for it, we perceive no pertinency to the question put to her on cross-examination, and which is above more particularly mentioned.

Tenth. There were certain exceptions to the charge. The court, after referring to the testimony of the plaintiff in error and other witnesses, in the nature of testimony to make out an *alibi*, went on to say that if it satisfied the jury that, at the time she testified to, he was not there, that fact disposed of her evidence. The court added. "But it is proper for me to remark that, no matter when it"—the illicit connection—"did take place, provided it was after the promise of marriage, and the consent, on her part, was in consequence of the promise of marriage." As a legal proposition, this cannot be deemed objectionable. It is criticised from its relation to the facts of this case, as tending to mislead the jury.

We do not think this was a direction to the jury, to inquire whether there was an illicit connection on some day after a promise of marriage other than that fixed by the complaint. It was rather a limitation given to the jury, that if they should find that there was illicit connection, they must find that it was after a promise of marriage and in consequence of it. It is argued here, by the plaintiff in

error, and was doubtless argued to the jury, that the promise of marriage testified to by the prosecutrix as having been made in May was not an absolute promise, but one conditional on the ability of the two to maintain themselves in the married state; and so too as to the promise made at the time of the connection, that it was conditional on that connection resulting in pregnancy. I conceive that it was to this that the court meant to apply its remark, excepted to; that whenever the promise of marriage was found to have been made, the act of coition must have followed that, and been consequent upon it. The context of the charge, both before and after the remark, shows that the court did not mean, and could not have been understood to mean, to instruct the jury to look for another time at which the carnal intercourse took place than that fixed by her. For both directly before and directly after, the court dwells upon the importance of the testimony of the plaintiff in error and his witnesses, in testing her credibility and the truth of her evidence, as to the commission of the offence at the particular time fixed by her.

Eleventh. There were certain requests to charge, which were refused, and exceptions taken.

1st. If the two were engaged to be married in May, the fact that the connection was in August was not enough to bring the case within the statute.

2d. The second seems but a repetition of the first.

3d. If the plaintiff in error promised to marry her in May, and if mutual promises were not then made, then the subsequent promise in August is not a sufficient promise to bring the case within the statute, even though he did have connection with her at the time.

4th. If the two mutually engaged to be married in May, 1875, then the after illicit intercourse does not bring the case within the statute.

The court refused to charge as requested, except as it had charged, but did instruct the jury that they must find from the evidence that the connection took place; that if it took place after the promise of marriage and in consideration thereof, that it was immaterial whether the promise was made in May or afterward, if it was before the seduction; that the promise might be made and the connection take

place afterward, and the crime be committed, if that connection was in consequence of that prior promise; and that the jury, in the opinion of the court, would be justified in finding a promise from her evidence if it was supported. The court had, before these requests, charged that if the promise of marriage was made, as testified to by her, that was sufficient under the statute. It is not easy to determine from the case just what was in the mind of the counsel when making these requests. If it was that some time having elapsed between the making of the promise and the doing of the act, therefore the statute would not apply, he was clearly in error; if it was that the promises either of May or of August, being conditional, therefore the statute would not apply, he was clearly in error. (26 N. Y., *supra*; 55 N. Y., *supra*; ante, *supra*.) His argument here is, that he sought to get from the court a ruling as to which promise the court referred to, in the charge in chief, by the use of these words: "Did this illicit connection take place in consequence of a reliance on her part upon his promise of marriage?" Clearly he was not entitled to insist upon the court or the jury being confined to one promise if there had been more than one. Nor is the remark of the court above quoted necessarily to be confined to one promise of marriage as is claimed. The phrase, "his promise of marriage" is not restrictive, but used in a general sense, as the court would have used the like phrase of "his conduct," as applying to all of his conduct.

It is suggested that the third request and refusal of it, and exception, brings up a question which we will state.

The prosecutrix testified that illicit connection took place in August; that when he proposed it she said he knew such things were not right; to which he made answer that she must remember "that it was him and her and it was all right," and that she knew if anything happened he would have her; that she asked him if he would not leave her, to which he replied, no, he would stand his ground. Now, it is said, that is not a promise of marriage in any event, but only in the event that she conceived from the carnal intercourse; and further, that the yielding to his request was not in consequence of a promise of marriage, but in consequence of a promise that if there were ill results from the

intercourse that then he would marry her. It is suggested that this is not such a seduction, under promise of marriage, as was contemplated by the statute. As to this suggestion, we remark at first, that the plaintiff in error did not present to this court that point; second, the testimony does not confine the yielding of the prosecutrix to a reliance of a promise to be fulfilled only in the event of pregnancy. She asked him if he would not leave her. We construe this, not as confined to the event of conception, but as embracing the whole act which he proposed under the relations existing between them, and as it is explained by the subsequent testimony by her, that after he had succeeded she told him that she was sorry that she had given up to him, for she did not think that he would think as much of her again. We do not think the occurrence and the conversation, as related by her, is susceptible of the interpretation that her mind was occupied with the result of connection. That idea does not come from her but from him. Her utterance is that it is not right. The act itself is wrong, is her thought. His answer is not, that it is always right, but she must remember that it is he and she, and that it is all right, evidently meaning, and meaning to give, and giving the idea, that in the close and intimate and pledged relations existing between them, it was right, as it was but anticipating the time when it would be right to ask and her duty to yield. The remark as to anything happening was from him, and was another argument used by him. She does not base upon such a probability her inquiry, if he would not leave her.

We are not able to see from the testimony, that there was room for the jury to find that there was a promise then based alone upon the result of pregnancy; that she was seduced in reliance upon a promise to be fulfilled only in such event.

We are not called upon to say, therefore, whether such a promise and such a yielding would make a case sufficient for the requirement of the statute. We do not mean to intimate an opinion either way.

We have gone through the whole of the testimony presented in the error, with care. We have considered every point presented by the plaintiff in error, upon his brief. We do not find that the court below made any error in its

rulings on the trial, or in its charge, or refusals to charge. It was a case for a jury. They have listened to and observed the prosecutrix and the plaintiff in error, and the witnesses produced. They have found the plaintiff in error guilty. No reason is shown to us for our interference with the verdict and the judgment upon it.

CHURCH, Ch. J., dissented.

The prosecutrix testified that on a certain Thursday evening, the 5th day of August, the prisoner came to the residence of Dr. Kimball, where she resided; that she met him in the hall, and, after a little conversation, the intercourse took place, and that the prisoner then went home. The evening is identified with particularity, and circumstantial precision. It was a "lodge night," when the prisoner usually called; it was before the prosecutrix attended the last day of a certain school, and that occurred on Friday, the next day; it was after the return of Mrs. Kimball, from an absence of several weeks, which was Tuesday evening before. It was prior to Monday the eighth when the prosecutrix had her monthly periods, as she states. There is no evidence and no claim that the prisoner ever had intercourse with the prosecutrix at any other time. The statute requires support or corroboration of the prosecutrix. She is not only not corroborated as to this circumstance, but all the evidence is in conflict with her statement. Mrs. Kimball's evidence tends strongly to establish that the first occasion, when the prisoner called at the house after her return, was Saturday evening, and she states circumstances entirely inconsistent with those related by the prosecutrix, when the intercourse took place. She states that on that evening the prisoner visited with her until about eleven o'clock, when he went home. Other evidence tends to establish that the prisoner did not see the prosecutrix on that evening, nor on any evening after Tuesday until Saturday. Corroboration by opportunity and the like may be sufficient, but having fixed time, place and circumstances, if these are not supported by any evidence, but contradicted by all the evidence, the prosecutrix is not sustained or corroborated by proof that intercourse was possible on some other occa-

sion than that testified to by her. The question is whether she is supported by other evidence, and not whether she ought to be credited. The statute requires supporting evidence, and, after a careful examination, I am unable to find any.

All concur with FOLGER, J., except CHURCH, Ch. J., dissenting.

Judgment affirmed.

NOTE.—The statute of 1848, for the violation of which the accused was tried, is as follows :

“§ 1. Any man, who shall, under promise of marriage, seduce and have illicit connection with any unmarried female of previous chaste character, shall be guilty of a misdemeanor, and upon conviction shall be punished by imprisonment in a State prison not exceeding five years, or by imprisonment in a county jail not exceeding one year ; provided that no conviction shall be had under the provisions of this act, on the testimony of the female seduced, unsupported by other evidence, nor unless indictment shall be found within two years after the commission of the offence ; and provided further, that the subsequent marriage of the parties may be pleaded in bar of conviction.”

The Legislature repealed this statute, and, in the place of it, enacted sections two hundred and eighty-four, two hundred and eighty-five and two hundred and eighty-six, of the Penal Code.

Those sections are as follows :

“§ 284. A person who, under promise of marriage, seduces and has sexual intercourse with an unmarried female of previous chaste character, is punishable by imprisonment for not more than five years, or by a fine of not more than one thousand dollars, or by both.

“§ 285. The subsequent intermarriage of the parties, or the lapse of two years after the commission of the offence before the finding of an indictment, is a bar to a prosecution for a violation of the last section.

“§ 286. No conviction can be had for the offence specified in section two hundred and eighty-four, upon the testimony of the female seduced, unsupported by other evidence.”

ED.

COURT OF APPEALS.

NEW YORK, 1878.

QUINN v. THE PEOPLE.

The accused was tried for burglary in the first degree, in the Court of Sessions of Richmond county, and he was convicted. The Supreme Court of the second judicial district, confirmed the judgment and the accused brought error.

The indictment alleged that the accused broke and entered, in the night time, "the dwelling-house of Frederick Kohnsen and John F. Lubkin, being copartners in business under the firm name and style of Kohnsen & Lubkin." The crime as defined by the Revised Statutes consists, in breaking into, and entering in the night time, in the manner there specified, the dwelling-house of another, in which there is at the time some human being, with the intent to commit some crime therein. The evidence showed the breaking and entering, and the criminal intent.

Held, that the questions to be decided are, first, whether it is legally proper, in an indictment for burglary of a dwelling-house, to aver the ownership in a partnership and, second, whether the proof showed that the room entered was a dwelling-house within the intent of the statute.

Held, as to the first point, that according to numerous and clear authorities, the ownership of the dwelling-house may be laid in the indictment to be in the members of a copartnership, where the facts of the case warrant it.

Held, as to the second point, that the definition of the crime of burglary given by the statute, does not differ from the definition of the crime of burglary at common law, and at common law it had been held that it was not needful that there should be an internal communication between the room or building in which the owner dwelt, if the two rooms or building were in the same inclosure, and were built close to and adjoining each other. Where the room or building entered, was under the same roof with the building or room occupied for sleeping in, it is part of the dwelling-house within the statutory or common law definition of burglary.

Held, that where different stores in a large building, some parts of which are used for sleeping apartments, and are rented to different persons for purposes of trade or commerce, or mechanical pursuit, or manufacturing, another rule comes in. That rule is, that a part of a dwelling-house may be so severed from the rest of it, by being let to a tenant, as to be no longer a place in which burglary in the first degree can be committed, if there be no internal communication, and the tenant does not sleep in it. Then it is not parcel of the dwelling-house of the owner, for he has no occupation or possession of it; nor is it a dwelling-house of the tenant, for he does not lodge there.

Max C. Huebner, for the accused.

John Croak, for the people.

FOLGER, J. The plaintiff in error was indicted for the crime of burglary in the first degree, under the section of the Revised Statutes defining that crime. (2 R. S., p. 668, § 10, subd. 1.) The crime, as there defined, consists in breaking into, and entering in the night time, in the manner there specified, the dwelling-house of another, in which there is at the time some human being, with the intent to commit some crime therein. The evidence given upon the trial showed clearly enough the breaking and entering, and the criminal intent. The questions mooted in this court are, whether it is legally proper, in an indictment for burglary in a dwelling-house, to aver the ownership of the building in a partnership, and whether the proof showed that the room entered was a dwelling-house within the intent of the statute. As to the first question: The indictment averred the breaking and entering into the dwelling-house of Frederick Kohnsen and John F. Lubkin, being copartners in business under the firm name and style of Kohnsen & Lubkin. The authorities are numerous enough and clear, that the ownership of the dwelling-house may be laid in the indictment to be in the members of a copartnership, when the facts of the case warrant it. In *Rex v. Athea* (R. & M. C. C. R., 329), the indictment averred the stealing in the dwelling-house of Halling and others. It appeared that Halling, Pierce & Stone carried on business on the premises in which the offence was committed. Pierce lived in the house, which was the joint property of the firm. The other partners resided elsewhere. It was held, upon a case reserved, that the dwelling-house was properly laid as that of all the partners. (See also *Rex v. Stockton & Edwards*, 2 Taunt., 339; 2 Leach, 1015; *S. C.*, *sub nom*; *Rex v. Stock et al.*, Russ. & Ry., 185; *Rex v. Hawkins*, Foster's Cr. Law, 38; *Rex v. Jenkins*, Russ. & Ry., 244; *Saxton's Case*, 2 Harr., 533.)

The facts of the case in hand are meagerly presented upon the error-book, but we gather from it, and from the concessions made upon the points and on the oral argument, that Kohnsen and Lubkin, the persons named in the indictment, were copartners in trade; and, as such, held and occupied the buildings, into one room of which the burglarious entry was made; that the lower or first stories of the buildings,

were used for the purposes of their business, and opened into each other; that in the upper rooms one only of the partners and some other persons lived, and were present on the night of the burglary. This state of facts is in accord with those presented in the cases above cited. We are of opinion that the first question presented must be resolved against the plaintiff in error. The ownership of the buildings was properly laid by the indictment in *Kohnsen & Lubkin*. The ownership remained with them; the actual possession of the portions of the buildings used for business was in them, and the possession of part of the portion of the buildings used to live in was in them, by the actual possession and occupation of that part by *Kohnsen*. They had not given such an interest to other persons in the whole or in parts of the buildings as to constitute an ownership in such other persons. (2 East P. C. C., 15, § 18, p. 502.) The cases are somewhat in conflict upon this point, it is true, and are not easily reconciled or distinguished; see *Rex v. Margetts et al.* (2 Leach, 930); but it is plain that here the partners, as such, had the ultimate control and right of possession of the whole buildings, and the actual possession of the shop entered, and of the sleeping-room above it, thus bringing the case within several decisions.

As to the second question: In addition to the facts already stated, it is needed only to note that there was an internal communication between the two stores, in the lower stories of the buildings, but none between them and the upper rooms, in which one of the partners and other persons lived. The room into which the plaintiff in error broke was used for business purposes only, but it was within the same four outer walls, and under the same roof as the other rooms of the buildings. To pass from the rooms used for business purposes to the rooms used for living in, it was necessary to go out of doors into a yard fenced in, and from thence up stairs. The unlawful entering of the plaintiff in error was into one of the lower rooms used for trade, and into that only. The point made is, that as there was no internal communication from that room to the rooms used for dwellings, and as that room was not necessary for the dwelling-rooms, there was not a breaking into a dwelling-house, and hence the act was not burglary in the first degree as defined

by the Revised Statutes as cited above. In considering this point, I will first say that the definition of the crime of burglary in the first degree, given by the Revised Statutes, does not, so far as this question is concerned, materially differ from the definition of the crime of burglary as given at common law, to wit, "a breaking and entering the mansion-house of another in the night, with intent to commit some felony within the same." * * * (2 Russ. on Cr., p. 1, § *785.) It will, therefore, throw light upon this question to ascertain what buildings or rooms were, at common law, held to be dwelling-houses or a part thereof, so'as to be the subject of burglary. For, so far as the Revised Statutes as already cited are concerned, what was a dwelling-house or a part thereof at common law, must also be one under those statutes. Now, at common law, before the adoption of the Revised Statutes, it had been held that it was not needful that there should be an internal communication between the room or building in which the owner dwelt, if the two rooms or buildings were in the same inclosure, and were built close to and adjoining each other. (*Case of Gibson, Mutton and Wiggs*, Leach's Cr. Cases, 320 [case 165], recognized in *The People v. Parker*, 4 J. C. R., 423.) In the case from Leach, there was a shop built close to a dwelling-house in which the prosecutor resided. There was no internal communication between them. No person slept in the shop. The only door to it was in the court-yard before the house and shop, which yard was inclosed by a brick wall, including them within it, with a gate in the wall serving for ingress to them. The breaking and entering was into the shop. Objection was taken that it could not be considered the dwelling-house of the prosecutor, and the case was reserved for the consideration of the twelve judges. They were all of the opinion that the shop was to be considered a part of the dwelling-house, being within the same building and the same roof, though there was only one door to the shop, that from the outside, and that the prisoners had been duly convicted of burglary in a dwelling-house. The case in Johnson's Reports (*supra*), is also significant from the facts relied upon there to distinguish it from the case in Leach (*supra*). Those facts were that the shop entered, in which no one slept, though on the same lot with the dwell-

ing-house was twenty feet from it, not inclosed by the same fence, nor connected by a fence, and both open to a street. The court said that they were not within the same curtilage, as there was no fence or yard inclosing both so as to bring them within one inclosure, therefore, the case was within that of *The King v. Garland*, 1 Leach Cr. Cas., 130, [or 171], Case 77. It has been urged, in the consideration of the case in hand, that though the common law did go farther than the cases above cited, and did deem all out-houses, when they were within the same inclosure as the dwelling-house, a part of it, yet that they must, to be so held, be buildings or rooms the use of which subserved a domestic purpose, and were thus essential or convenient for the enjoyment of the dwelling-house as such. *Gibson's Case* (*supra*), would alone dispose of that. The building there entered was not only of itself a shop for trade, but it was in the use and occupation of a person other than the owner of the dwelling-house. The books have many cases to the same end. *Rex v. Gibbons & Kew* (Russ. & Ry., 145), the case of a shop. *Robertson's Case* (4 City Hall Rec., 63), also a shop with no internal communication with the dwelling-house. *Rex v. Stock et al.* (Russ & Ry., 185), a counting-room of bankers. *Ex parte Vincent* (26 Ala., 145), one room in a house used as a wareroom for goods. *Rex v. Wite* (Ry. & M., 248), an office for business, below lodging rooms. Indeed, the essence of the crime of burglary at common law is the midnight terror excited, and the liability created by it of danger to human life, growing out of the attempt to defend property from depredation. It is plain that both of these may arise, when the place entered is in close contiguity with the place of the owner's repose, though the former has no relation to the latter by reason of domestic use or adaptation. Besides, the cases have disregarded the fact of domestic use, necessity or convenience, and have found the criterion in the physical or legal severance of the two departments or buildings; (*Rex v. Jenkins*, Russ. & Ry., 244; *Rex v. Westwood*, Id., 495); where the separation of the buildings was by a narrow way, both of them being used for the same family domestic purposes. It is not to be denied that there are some cases which do put just the difference above noted, as now urged for the

plaintiff in error. (*State v. Langford*, 1 Dev., 253; *State v. Jenkins*, 5 Jones, 430; *State v. Bryant Ginas*, 1 Nott & McCord, 583.) Though, in the case last cited, it is conceded that if a store is entered, which is a part of a dwelling-house, by being under the same roof, a crime is committed; and it must be so, if it is the circumstances of midnight terror in breaking open a dwelling-house, which is a chief ingredient of the crime of burglary; and it is for that reason that barns and other out-houses, if in proximity to the mansion-house, are deemed *quasi* dwelling-houses, and entitled to the same protection. (*State v. Brooks*, 4 Conn., 446-449.) Coke (3 Inst., 64), is cited to show that only those buildings or places, which in their nature and recognized use are intended for the domestic comfort and convenience of the owner, may be the subject of burglary at common law; but in the same book and at the same page the author also says: "But a shop wherein any person doth converse,"—*i.e.*, be employed or engaged with; Richardson's Dic., *in voce*; "being a parcel of a mansion-house, or not parcel, is taken for a mansion-house." So Hale is cited (1 vol. P. C., 558); and it is there said that, to this day it is holden no burglary to break open *such a shop*." But what does he mean by that phrase? That appears from the authority which he cites (Hutton's Reps., 33); where it was held no burglary to break and enter a shop, held by one as a tenant in the house of another, in which the tenant worked by day, but neither he nor the owner slept by night. And the reason given is the one above noticed and often recognized by the cases, that by the leasing there was a severance in law of the shop from the dwelling-house. But Hale also (vol. 1, P. C., page 557), cites as law the passage from The Institutes above quoted, other citations from text books are made by the plaintiff in error; they will be found to the same effect, and subject to the same distinction as those from Coke & Hale. And see *Rex v. Gibbons et al.*, *supra*; *Rex v. Richard Carroll*, 1 Leach Cr. Cas., 272, Case 115. That there must be a dwelling-house, to which the shop, room, or other place entered belongs as a part, admits of no doubt. To this effect, and no more, are the cases cited by the plaintiff in error, of *Rex v. Harris* (2 Leach, 701); *Rex v. Davies, alias Silk* (*id.*, 876), and the

like. There were cases which went further than anything I have asserted. They did not exact that the building entered should be close to or adjoining the dwelling-house, but held the crime committed, if the building entered was within the same fence or inclosure as the building slept in. And the dwelling-house in which burglary might be committed was held formerly to include out-houses—such as warehouses, barns, stables, cow-houses, dairy-houses—though not under the same roof or joining contiguous to the house, provided they were parcel thereof. (1 Russ. on Cr., *799, and authorities cited.) Any out-house within the curtilage, or same common fence with the dwelling-house itself, was considered to be parcel of it, on the ground that the capital house protected and privileged all its branches and appurtenants, if within the curtilage or home-stall. (*State v. Twitty*, 1 Hayw. [N. C.], 102; *State v. Wilson*, id., 242; see also *State v. Ginns*, 1 Nott & McCord, 585, *supra*, where this is conceded to be the common law; see note *a* to *Garland's Case*, *supra*.)

It seems clear, that at common law the shop which the plaintiff in error broke into would have been held a part of a dwelling-house.

The rules of the common law as to this crime have been affected by statutory provision in this State. At common law there were no degrees of burglary. The breaking into a dwelling-house in the night, with felonious intent, made the crime, and any building within the curtilage was deemed a dwelling-house. But the revisors thought that the offence partook of different degrees of criminality, and sought to class them according to their atrocity. They saw that when the breaking was into a building in which some one was at the time sleeping, there was, by the act, a liability to create alarm, to provoke resistance and an affray, and to endanger human life (*Rex v. Higgs*, 2 Cam. & Kirwan, 322); and that there was greater recklessness and depravity in the offender. (5 Edmond's Stat., p. 544.) So they made that act burglary in the first degree, and affixed to it the severest statutory penalty, of not less than ten years imprisonment in the State prison. (2 R. S., pp. 668, 669.) And mindful of the extent to which the courts had gone, as is herein above shown, in

holding an outer building a dwelling-house, they defined that word for the purposes of the Burglary Act as follows:

"Section 16. No building shall be deemed a dwelling-house, or any part of a dwelling-house, within the meaning of the foregoing provisions, unless the same be joined to, immediately connected with, and part of a dwelling-house." (2 R. S., p. 669, § 16.)

From this it is contended that a shop or store, like that entered in this case, having no internal communication with the parts of a building used for the purpose of a dwelling-house, is not within the Burglary Act a dwelling-house, or a part of one. But it is plain, that in reporting this sixteenth section, the idea in the minds of the revisors was to exclude from the grade of burglary in the first degree, and from its severity of punishment, a felonious breaking into any building so removed or detached from a dwelling-house in which was some person, as that there would be no likelihood of endangering human life by the act; yet to keep within that grade any building so joined to, immediately connected with and a part of a dwelling-house, as that by the felonious act, that likelihood would arise; and this must be kept in mind in construing that sixteenth section. There is another thing to be noticed. The word they used in the sixteenth section is "*building*." "No *building* shall be deemed a dwelling-house, * * * unless," etc. Evidently they meant a structure which, of itself, was a building, so as to stand and subsist, separate and independent, from the other structure, which is the dwelling-house of the owner. They meant to exclude uninhabited out-houses, isolated from the inhabited dwelling-house and forming no part thereof, and having no junction or connection therewith. They have given us a key to the meaning of the word building as thus used by them. In their note upon this sixteenth section (5 Edmond's Stat., 545), they refer to the Arson Act for a provision to the same purport. (2 R. S., 661, § 10.) This is their language: "The same description is in arson of the first degree," section 11, title 1. Turning to that section eleven, which, as enacted, became section ten, just above cited, we find it thus:

"But no barn, shed, or other out-house shall be deemed a dwelling house, or part of a dwelling-house, within the

meaning of the last section, unless the same be joined to, immediately connected with, and part of a dwelling-house."

It is plain that the word "building" in the sixteenth section (in the Burglary Act) means any barn, shed, or other out-house, and it is proper, in construing that section, to substitute those words for that word; when that is done, it is also plain that the sixteenth section has no application to a room in a building used as a dwelling, within the same outer walls, beneath the same roof. The Arson Act has such a likeness to the Burglary Act that a decision upon a like point under the former act will be applicable to the case in hand. In *The People v. Orcutt* (1 Parker R., 252), the Oneida Oyer and Terminer charged the jury, "that it was not necessary that the whole building should be occupied usually by persons lodging therein at night; if a part of it was occupied as a sleeping-room it was sufficient." In that case the building set fire to and the one used to sleep in had lofts opening into each other, but that fact is not dwelt upon by the court. And consonant with that is *Rex v. Winters* (Russ. & Ry., 295), which was the burning of a school-house, under the same roof as the dwelling-house, but practically separated therefrom by a narrow way. It was held that it was both an out-house and a part of the dwelling-house, there being two counts in the indictment which respectively so alleged. It is manifest that the revisers and the Legislature meant to exclude from the grade of burglary in the first degree, and from the severity of the punishment therefor, an entry into a structure, within the same inclosure as the dwelling-house, but not so connected with it as that an entrance into the former by force would be likely to rouse one sleeping in the latter. They did not mean a room, or part of the same structure with the dwelling-house, within the same four outer walls, and beneath the same roof, though there was no internal communication between the room entered and the room of the sleeper. It is plain that a violent entry into such a room would be likely to rouse the occupant of the sleeping-room, and draw him forth to an encounter and liability to death or injury, in defence of his goods. I do not find any adjudication in this State upon this sixteenth section. In England there are cases upon analogous statutes. There the severity of the common law

has also caused enactments (7 & 8 Geo. 4, ch. 29, § 13; 24 & 25 Vict., ch. 96, § 53); which declare, in substance, that the building entered must be a part of the dwelling-house, and that it is not to be so deemed unless there shall be a communication between such building and the dwelling-house, either immediate, or by means of a covered and inclosed passage leading from one to the other. It will be observed that these statutes are much more particular in requiring a communication than in section sixteen of the Revised Statutes above quoted. *Rex v. Burrows* (1830), (1 Mood. C. C., 274), is one adjudication construing this provision, where the prisoner on an indictment for burglariously entering a dwelling, was proved to have entered a wash-house which had no internal communication with any part of the dwelling-house, as the door of the wash-house opened into a back yard. But it was under the same roof. It was held by seven judges against five that the wash-house was a part of the dwelling-house. In *Somerville's Case* (1834), 2 Lew., 113; *Rex v. Higgs* (supra), (1846); *Rex v. Turner* (1834), 6 Carr. & C., 407; *Rex v. Westwood* (1822), Russ. & Ry., 495; *Eggington's Case*, 2 East P. C., 494, it was held that the building entered was not a dwelling-house, or a part of one; but in each of these cases it is mentioned as one of the facts which led to that conclusion, that the building or room entered was not under the same roof with the building or room occupied for sleeping in. I find no decision that where the room or building entered, was under the same roof and within the same four walls, it was not held to be a part of the dwelling-house within the statutory or common law definition of burglary.

From this discussion it appears that the act of the plaintiff in error, in breaking into the store in the night time with felonious intent, a part as it was of the whole building, in other parts of which there were persons dwelling and sleeping at the time, though there was no internal communication between the store and their rooms, was an act of recklessness and depravity, likely to cause alarm and to lead to personal violence and so endanger human life. It also appears that the revisers and the Legislature, in the defining and restrictive section quoted (§ 16 of the Burglary Act), did not mean to say that one room in a whole build-

ing, within the same outer walls and under the same roof as the whole building, must be also connected with the rest of the building by an internal, inclosed and covered communication, to make it a part of that building, and to make it a part of a dwelling-house within the definition of burglary in the first degree given by them, if any part of the building was occupied for the purposes of a dwelling-house.

I am brought to the conclusion that upon the facts proved, the plaintiff in error was properly indicted and convicted of the statutory crime of burglary in the first degree.

The judgment brought up for review should be affirmed.

It may ward off misapprehension if it is said, that if different stores in a large building, some parts of which are used for sleeping apartments, are rented to different persons for purposes of trade or commerce, or mechanical pursuit, or manufacturing, another rule comes in. For illustration, let there be mentioned the Astor House in New York city. The rule is, that a part of a dwelling-house may be so severed from the rest of it, by being let to a tenant, as to be no longer a place in which burglary in the first degree can be committed; if there be no internal communication, and the tenant does not sleep in it. Then it is not parcel of the dwelling-house of the owner, for he has no occupation or possession in it; nor is it a dwelling-house of the tenant, for he does not lodge there. (1 Hale P. C., 557, 558; Kel., 83, 84; 4 Black. Com., 225, 226; East P. C. C., 15, § 20, p. 507.)

ALLEN, MILLER and EARL, JJ., concur; RAPALLO and ANDREWS, JJ., dissent; CHURCH, Ch. J., not voting.

Judgment affirmed.

COURT OF APPEALS.

NEW YORK, 1877.

THE PEOPLE V. SMITH.

The accused was indicted and tried by the Court of Sessions of Jefferson county, for selling strong and spirituous liquors, wines, ale and beer, in quantities less than five gallons at a time, to be drank on the premises, without having an inn-keeper's license therefor. The jury found him guilty. The Supreme Court reversed the judgment and the people bring error.

It appeared on the trial that the accused did sell intoxicating liquors in the quantities named to be drank upon his premises, and without having a tavern license. It also appeared that the board of excise gave the accused a license to sell on his premises and that such license was granted under the fourth section of the act of 1870. It was claimed by the accused that the act of 1857 was so in conflict with section four that it was repealed and that section four was in force.

Held, that the act of 1857 was not repealed by implication or by express terms, by the act of 1870, only where the provisions of the act of 1857 were inconsistent or in conflict with the provisions of the act of 1870.

Held, that to determine what is repealed is left to the judicial inquiry of what conflicts and what is inconsistent, and the conflict and inconsistency must be plain and unavoidable to make the law of 1857 fall. Take the two acts and read the parts under consideration and consecutively, and they will flow, with some pruning of the verbiage, as one well constructed, consistent enactment, harmonious in all its parts. This being so, the effect of the clause of the act of 1870, that "the provisions of the act of 16th April, 1857, except where the same are inconsistent or in conflict with the provisions" of the act of 1870, "shall be taken as a part of" it, "and be and remain in full force and effect throughout the whole of this State," makes those parts of the act of 1857 in question, in full force and a part of the excise law of the State.

Watson M. Rogers, district attorney, for the people.

Thomas F. Kearns, for the accused.

FOLGER, J. The defendant was indicted and tried for selling strong and spirituous liquors and wines by retail, in quantities less than five gallons at a time, to be drank on his premises, without having a license therefor as an inn, tavern, or hotel-keeper. The jury found him guilty. There is no serious question but that he did sell intoxicating liquors in the quantities named to be drank upon his premises. There

is no question but that he did so without having a tavern license. His main defence was, that the board of excise of the city of his abode had given him a license to sell on his premises in the quantities named. The indictment was framed under the fourteenth section of the act of 1857 (chap. 628, pp. 404, 410). The license relied upon by the defendant was granted under the fourth section of the act of 1870 (Laws of 1870, chap. 175, p. 456), and his farther reliance is that those two acts so conflict at this point as that the former is repealed as far as it relates thereto. And that is the real inquiry here ; do the provisions of the fourteenth section of the act of 1857, and other kindred sections of that act, so conflict with the fourth section of the act of 1870, and other kindred sections of it, as that the former must fall ? We are not left simply to find an implied repeal of the act of 1857, by the repugnancy of its provisions to those of the act of 1870. The legislature of 1870 plainly had in mind the act of 1857, and referred to it in their legislation in explicit and saving terms.

The phrase in statutes that "all acts or parts of acts inconsistent herewith are hereby repealed" is very common. It is used mostly, when the draftsman has quite covered the subject by his proposed enactment, and when there is no desire to save anything on the same subject in previous legislation. The phrase in the act of 1870 is materially different, and conveys no such notion. It is expressive not only of a desire to save provisions in the act of 1857, but of the consciousness of a necessity of doing so, to make of the act of 1870 a complete and operative enactment. Its language is :

"The provisions of the act passed April 16, 1857, except where the same are inconsistent or in conflict with the provisions of this act, shall be taken and construed as a part of this act, and be and remain in full force and effect throughout the whole of this State."

This is an uncommon and emphatic legislative expression. With how much greater force, in view of it, the rule of interpretation bears upon us : that a repeal of statutes by implication is not favored in the law, and, that when both the latter and the former statute can stand together, both will stand, unless the former is expressly repealed, or the

legislative intent to repeal is very manifest. The language of the books upon this subject uses all the forms of expression to show that it is the last thing to be done to declare that there is a repeal by implication; the inconsistency must be irresistible, and impossible of reconciliation; the difference must be a repugnancy (a strong word) not to be allayed. Here there is no express repeal. To determine what is repealed is left to the judicial inquiry of what conflicts, and from the force of the clause above quoted, as well indeed as from the rules of interpretation, the conflict must be plain and unavoidable to make the prior statute fall. The legislative intent to repeal is never lightly to be inferred, and should be ascribed with great hesitation in this case, in view of the peculiar and striking phraseology of the reference to the former act. The act of 1857, when it became a law, was the sole Excise law of the State. It by express language repealed the provisions on that subject of the Revised Statutes; (1 R. S., pp. 677 *et seq.*), and the act of 1855 (chap. 231 p. 340), and also repealed all other acts inconsistent with itself. It thus stood the law by which alone the privilege of selling liquor in small quantities could be reached. But it adhered to that which for many years had been the policy of the State, extending, indeed, back to colonial times (see 1 Van Schaick's Laws, p. 741, 1773), and adhered to ever since, save at few intervals of greater restrictions. That policy was, that the privilege to sell strong liquor to be drunk at the place and time of sale, would be given to him only who proposed to keep a tavern there, while the privilege to sell in small quantities to be taken away from the place and drunk might be given to others who did not propose to keep a tavern. It also adhered to another feature of former and long-continued legislation on this subject—that the same act which gave a power to grant a license to sell liquors as a tavern-keeper, prescribed what must be had and kept to enter upon that calling, and enforced the prescription by a penalty. When the act of 1857 became a law, it was the sole law regulating the keeping of taverns. Mention is made of these two things, so as to add, that an intention to change this policy and usage, so long sanctioned, is not to be lightly imputed to the legislature. If such purpose was formed by it, we should look

for a plain expression thereof, and not feel forced to find it in slender implication or by labored interpretation. This law of 1857 stood as the Excise law of the State, unquestionably embodying this policy and usage so far as the State in general is affected, until the passage of the act of 1870. It is claimed that it had been infringed upon in favor of localities. In 1866 an act was passed for the Metropolitan Police District (except Westchester county). That act, however, was a law complete in itself, and excluded from that district the operation of all other laws upon the subject. It may be conceded that, more by the absence of restrictive clauses than by affirmative provisions, it did permit the granting of licenses to sell liquors in small quantities, to be drank at the time and place of sale, without limiting the privilege to tavern-keepers; for there is no mention of tavern-keepers in it, nor any reference to any law as a part of it, which deals with that class of citizens. It was again infringed upon in 1867, when the same legislation was copied as to the Niagara police district. And it was also restricted in 1869, when power was given to license to sell ale or beer to be drank at the place without keeping a tavern there. This legislation, however, was plain enough, in showing a legislative intent to contravene the provisions of the act of 1857.

An argument is made that the act of 1870 conflicts with that of 1857, in the matter we are considering, from the fact that the act of 1870 adopts the very language of the acts as to the two police districts. As will be seen hereafter, that form of legislative expression is not so modern as the year 1866; and it is of counter significance, that the origin or forerunner of the act of 1870, was a bill simply to repeal the Metropolitan Police District Excise Act, introduced into the senate of the State by a senator from that district, referred to a standing committee, and reported back with a recommendation for its passage. (Senate journal, 1870, pages 7, 40, 42.) For that bill, at a later day, the act of 1870 was made a substitute, itself containing a repeal of that Metropolitan Excise Act, and a prospective repeal of the Niagara police district excise law.

It is argued that the legislative intent was to extend the policy of the Metropolitan district excise law over the whole

State. There is ground, quite as well, for the opposite inference, that seeing the ancient policy of the State gradually eaten into by infringements for localities, the legislature meant to bring the whole State again under the former rule. And now we have as the excise law of the State, "in full force and effect throughout the whole of this State," the act of 1870, re-enacting and embodying with itself such parts of the act of 1857 as are not in conflict. It is plain at a reading, that the act of 1870 needs aid and supplement from the act of 1857 in many particulars, before it can be a complete and operative excise law. The act of 1870 was meant beyond doubt to aid in the restraint of the unlicensed and promiscuous sale of liquors in small quantities; yet there is not in it, as originally passed, a penalty affixed to an offence, nor an offence declared by it. There is no provision in it for the bringing of suits for penalties, nor for the disposal of moneys collected thereby. Numerous are the provisions needed in a law dealing with the retail sale of intoxicating liquors, requisite to prevent an abuse of the privilege to sell, or to repress the sale without the privilege, for which the act of 1870 has to lean upon the act of 1857. So it has for all the provisions for the regulation of taverns. So it has for all the official, ministerial and judicial prescription, which such a law must have to be efficient.

It is quite obvious that, while meant as an excise law, not merely for revenue, but for restriction of sale, and in aid of order and good morals, it is but a skeleton enactment, and must be endued with active power of putting upon it provisions from other statutes.

It is contended that the fourth section of the act of 1870 is a clear and explicit authority to the commissioners of excise to grant a license to any person of good moral character approved by them, to sell liquor at a place to be named, in quantities less than five gallons. This may be conceded when it is read alone. It is then said that in the absence of any restriction the licensee may sell to be drank upon his premises. This may be conceded if the absence is of a restriction upon the power to grant the license. It is then said that the act of 1870 was obviously intended to change the law and to introduce a new system, and not amend an old law, and the inference made is, that it meant

not to impose that restriction. This is the question at issue, depending upon its solution upon what parts of the act of 1857 are taken into the act of 1870, not by an amendment of an old law, to be sure, but by re-enacting the old law and incorporating it with the new. The fourth section of the act of 1870 does, in general phrase, give power to the commissioners of excise to grant license to sell in small quantities. But is not a license to sell in small quantities not to be drank on the premises, a license to sell in small quantities? and is not a license to sell in small quantities to be drank upon the premises, a license to sell in small quantities? The first is the general power; the two others are the particulars of that generality. There is no inconsistency or conflict between either of the particulars and the general, no more than there is between the trunk and a branch of a tree. As has already been said in this court, "the principal purpose of the act of 1870 seems to have been to change the excise boards from county boards to city, town and village boards." (*Board of Excise Ontario County v. Garlinghouse*, 45 N. Y., 249.) It was necessary, after creating the new boards, to clothe them with a general power to grant licenses, for they were not named in the act of 1857, and hence got no power from it to issue a license. Besides that, there is other difference in the enactment of considerable materiality. Thus, the requirement of the act of 1857 of a petition from twenty freeholders, is done away with, and a large discretion is given to the commissioners. So that this provision, without the large scope claimed for it, is not purposely meaningless, as is sometimes asserted. When they were given the power to issue licenses, it did not need also to particularize the licenses they were to issue, for they were specified in the act of 1857. The provisions of the act of 1857, as to the kinds of license, if standing in force, attached themselves at once to the general power granted by the fourth section of the act of 1870, and governed the manner of its particular exercise. A law which in one section gave to a body of persons in a municipality the power to grant licenses to sell liquors in small quantities; and in another section prescribed that when it was intended that the licensee might so sell, to be drank upon his premises, it should be thus specified in his license; and in another sec-

tion, that when it was intended that he might not so sell, except to be taken away from his premises undrank, it should be thus specified in his license ; would not properly be said to be inconsistent and in conflict in its provisions. It would be a good legal composition thus systematically to begin with an expression of general power, and to go on to the ramification into particular modes of exercise of it. There is an instance of this in the text of the act of 1870, copied from the excise act of the Metropolitan District. Section four gives the general power to license any person of good moral character to sell in small quantity. Here is no expressed restriction as to time or occasion. But section five forbids a sale or giving away between the hours of one and five in the morning. There is no repugnancy in these two provisions, arousing a conflict between them so that one must entirely give way that the other may stand. It is so with all statutes which confer power and grant privileges, and then create safeguards upon the exercise of them. There are still more striking instances. One is in Van Schaick's laws, already referred to, §§ 2, 5, 13, 15. One other is in 2 Jones & Varick's laws (1788), p. 284, §§ 3, 9 and 10 ; and in 1 Greenleaf's laws (1788), p. 116, §§ 3, 6. The last two have so curiously a close resemblance to the fourth section of the act of 1870 that I forbear not to copy the third section which gives the general power to grant permits.

" III. It shall and may be lawful for the commissioners of excise, appointed or to be appointed by virtue of this act, annually, by writing under their respective hands and seals, to grant to *the several persons*, who shall reside in the respective cities, towns or places for which they shall be appointed as commissioner or commissioners as aforesaid, who shall apply for the same, permits to retail strong or spirituous liquors under five gallons, which said respective permits shall continue in force from the time of granting the same until the first day of March next ensuing the date of such permit, and no longer."

I have italicised the words "the several persons" in this section, for that an argument is founded by the defendant upon the use of like words ("any person or persons,") in the act of 1870, that the use of the "generic term, instead of

special terms," indicated the purpose of the legislature to extend the privilege of license to all persons instead of an enumerated few. Yet, after the use of like phrase in section 3 of the act of 1788, we find a subsequent section making the distinction between those proposing to keep a tavern, who are to have a permit to sell to be drank on the premises, and those who do not so propose, who are not to have such permit, but only one to sell to be taken away (section 9). And thus we have an example of a statute harmonious and consistent in its several sections, stating with the bestowal of general power to grant permits, and after that declaring the particular modes in which that power shall be exerted. And if harmonious and consistent when found in one act, are not the same provisions harmonious and consistent though found in two acts? Who then may say that these provisions in the act of 1857 are in conflict and have been repealed? It makes no different enactment than that above suggested, to unite in one act the 4th section of the act of 1870, and the first clause of the second sentence in section 2 of the act of 1857, and the first clause of section 6 of the latter act, and section 119 of the same act, and section 14 of the same act. The verbiage is more, but the essence of the enactment is the same. Let any one take the two acts and read these parts of them consecutively, and they will flow, with some pruning of the verbiage, as one well constructed, consistent enactment, harmonious in all its parts. This being so, is not the irresistible effect of the clause of the sixth section of the act of 1870, that "the provisions of the act of 16th of April, 1857, except where the same are inconsistent or in conflict with the provisions" of the act of 1870, "shall be taken as a part of" it "and be and remain in full force and effect throughout the whole of this State," is it not its irresistible effect, that those parts of the act of 1857 above cited do remain in full force and effect, and are a part of the excise law of the State?

Some other parts of the act of 1870, which have been copied from the act of 1866 (the Metropolitan District Act), have been relied upon to show that it was the purpose of the legislature to extend the policy of that act over the whole State. We do not think that such is a necessary conclusion. Thus, the provision that all licensed places shall be closed from one

to five o'clock in the morning, is claimed as one peculiarly designed in its nature for places where sales are made of liquor to be drank on the premises. It would be more correct to say that it is more applicable to such places. It may not be denied that benefit will also come from the closing at that time, or at some hours of the night, of any place where sales are made in small quantities to be drank there or be taken away. The evils from the abuse of intoxicating drinks—and no observer of his kind can deny that there are evils therefrom—do not have their spring alone in the quaffing at the bar of a tavern. The purchase by the small measure and carrying away to be drank in seclusion is alike causative, and a wise lawgiver might well enact that the community should have some hours in the twenty-four of total cessation from each kind of traffic; and the same remark is applicable to the provision against sales on election days and on Sundays.

Much stress has been put upon the language, new, we believe, in the Metropolitan District Act, and copied into the act of 1870, that persons not licensed may keep, and, in quantities not less than five gallons at a time, may sell, strong and spirituous liquors, provided that no part thereof shall be drank on the premises. See how this provision enforces our argument. It cannot be supposed that it was not the intention of the legislature to prohibit the drinking in such case upon the premises, and to enforce the prohibition by punishment; yet the act is silent upon that subject. If it was meant to inflict a penalty, we have to look to the act of 1857 for the announcement of it. But it cannot be found there, save in the fourteenth section, the very section under which this defendant is indicted. So the dilemma is presented, that the legislature have made a provision prohibitory in its nature, with no penalty as a sanction, or that it has sent us back to a section of the act of 1857 to find the penalty, by which section it is declared that no one may sell to be drank on his premises without having a tavern license, under a penalty of \$50 for each offence. It is stated in the defendant's points that all persons had a right to sell in quantities of five gallons and over without any restriction as to where it could be drank, until the act of 1870, which prohibited it from being drank in the build-

ing. This is a mistake. The fourteenth section of the act of 1857 prohibits the sale of any quantity, large or small, to be drank upon the premises, without having a license as a tavern-keeper.

And this idea reaches further yet. It will not be claimed that the act of 1870 was passed, providing for the granting of licenses on the payment by the applicant of a license fee and the showing of a good moral character, and meeting the approval of the Board of Excise Commissioners; and that the Legislature did not have a purpose that those who sold in small quantities without a license should be held as violators of the law, and should be punished therefor. But there is no word in the statute of express prohibition of such sale; nor any word fixing punishment therefor, either by imprisonment, fine, or penalty. What then? Is it so, that those who have no license to sell in small quantity have saved the license fee and the trouble of the application, and yet may sell by the small quantity, to be drank upon the premises without punishment or rebuke? No one so hardy as to claim this. But where is the enactment fixing the punishment, or even declaring the prohibition? In the act of 1857, and there alone. It is in the same fourteenth section. We are not unmindful of the rule in *Behan's Case* (17 N. Y., 516). But here, in the act of 1870, there is neither declaration of punishment, nor express prohibition of the act. And resort must be had to the prior statute, or the startling alternative is presented that there is no law in this State, forbidding and punishing the sale of strong liquors in small quantities without having a license therefor. How significant in that view becomes the clause of the act of 1870, re-enacting the material parts of the law of 1857, to be and remain in full force and effect throughout the whole of this State.

There is another thing which materially sustains the position taken in the above discussion. It is a principle that the purpose and intention of the legislature, as to the repeal of an act, may be obtained from its dealing with that act, by legislation affecting it, had subsequent to the statute by which it is claimed to have been repealed. (*Smith v. The People*, 47 N. Y., 330, 340.)

Now since the passage of the act of 1870, the legislature

has in repeated enactments recognized the existence, as an operative law, of the act of 1857, and in such manner as to repel the idea of a legislative purpose to obliterate its penal provisions. See chap. 332 of the Laws of 1871, § 1, p. 643. By this act it is expressly recognized, which is tantamount to a legislative assertion, that some at least of the fines and penalties provided for by the act of 1857 are collectible, and to be sued for and recovered by the provisions of that act.

By the act chap. 549, of the Laws of 1873 (§ 5, p. 861), the 21st section of the act of 1857 is amended, which section, and as a consequence which amendment, recognizes the distinction between an inn, tavern or hotel-keeper, and other person. Chap. 820 of the same year (p. 1234), recognizes the existence of sections 22, 15, 19 and 30 of the act of 1857. This quite certainly. It would be capable of at least plausible reasoning, the proposition that "all the penalties imposed by" the act of 1857 were still in force and collectible in case of infringement. (See § 1 of chap. 820.)

Chap. 642 of the Laws of 1874 (p. 430), is a local act confined to the county of Westchester. It is very significant. If the act of 1870 gave power to license any but an inn-keeper to sell by small quantities to be drunk on his premises, then that power existed in Westchester county. But here we have a statute passed in 1874, which is minute and particular in giving power to grant such license to keepers of restaurants, saloons, etc., as well as to inn-keepers, etc. Thus it recognizes the policy of the act of 1857, and impliedly admits the existence and efficacy of the provisions of it, by the special legislation to provide a different rule for the county of Westchester.

These repeated expressions of the legislature are very significant that the act of 1857 was considered by it to be, in many of its provisions, still in force.

We have not taken into notice some enactments passed at different times upon the subject of the sale of liquors, because they do not affect the question in this case. A consideration of the acts of 1857 and 1870 is chiefly necessary here.

Our conclusion is that there is not that repugnancy between the material provisions of the two acts which brings them

into conflict. It is too difficult, not to say impossible, to find any complete excise law in existence, which will regulate the sale of intoxicating liquors, prohibit and punish the unauthorized sale thereof, and regulate the keeping of taverns, without referring to the material parts of the act of 1857, for us to hold it in those parts inconsistent and in conflict with the act of 1870, unless we say that the Legislature that passed the act of 1870 did not intend that there should be such a law for the State. We hear no suggestion that such was the case, and do not for a moment entertain the idea ourselves. We think that the intent of the Legislature was to continue the policy and usage of the State in this important matter of the sale of intoxicating liquors, and that from the emphatic manner in which parts of the act of 1857 are kept in operation, and from the resemblance of this legislation to all that has gone before it, we are to be slow to imply a repeal of its material parts, or to so construe the act of 1870 as to work out a repugnancy. Hence, we are of the opinion that the judgment of the General Term on this part of the case was erroneous, and that of the Sessions was correct. The defendant at the trial in the Sessions took other exceptions, and has also presented them on his points here. We have examined them. We do not find that the Court of Sessions made any error in its rulings in these respects.

In our opinion the judgment of the General Term should be reversed, and that of the Sessions affirmed.

All concur.

Judgment accordingly.

SUPREME COURT.

First Department—New York, 1875.

SCHWAB V. THE PEOPLE.

The accused was indicted in the county of New York for selling wine without license, in a quantity of less than five gallons, to be drank upon his premises.

The counsel for the accused claims that the act of April 16, 1857, has been rendered inapplicable to the county of New York.

Held, that while the law passed April 16, 1868, was in force, the act of 1857 was inapplicable, but that law was expressly repealed by section 6 of chapter 175 of the Laws of 1870; and that section declared that the act of April 16, 1857, should be and remain in full force and effect throughout the State, so far as it was not inconsistent or in conflict with the provisions of the act of 1870. The law of 1857, in regard to the objection made, not being inconsistent with the law of 1870, is in full force.

The indictment was in the usual form. It contained the averment in the first count, that the sale was made in the ninth ward of the city of New York, to be drank in the house, store, shop and place of the seller.

Held, that such averment was all that was required in this respect to bring the case within the restraint imposed by the statute. It fully apprised the accused of the nature of the crime charged, and of the time and place where it would be claimed by the prosecution the offence had been committed by him.

Objection was taken to the evidence given by the prosecution that the seller had no license.

Held, that such proof was not required to be given to make out the case on the part of the people and, therefore, if defective testimony had been given, it could work no possible injury to the accused.

An exception was taken to the refusal of the court to charge the jury that they must acquit the accused, because the prosecution failed to prove that the wine sold was of an intoxicating nature.

Held, that the instruction was properly declined. The statute does not require that to be shown in order to create the offence charged. The law in direct terms, prohibited the sale of *wine* in quantities less than five gallons at a time, to be drank on the premises of the seller, when it was made without license. This included *all wines* used for drink.

John McKeon, for the accused.

B. K. Phelps, for the people.

DANIELS, J.: The defendant in error was convicted of a misdemeanor, committed by selling wine without a license, in a quantity of less than five gallons, to be drank upon his

premises. The indictment was found under the act of April 16, 1857. By that act it was provided that whoever shall sell any strong or spirituous liquors or wines, to be drank in his house or shop, or any out-house, yard or garden appertaining thereto, or shall suffer or permit any such liquors or wines sold by him, or under his direction or authority, to be drank in his house or shop, or in any out-house, yard or garden thereto belonging, without having obtained a license therefor, as an inn, tavern, or hotel keeper, shall forfeit fifty dollars for each offence. (2 R. S. [5th ed.], 942, § 15.) And a violation of this provision has been held to be a misdemeanor. (*Behan v. People*, 17 N. Y., 516.)

But the counsel for the plaintiff in error objects, that this section of the statute has been rendered inapplicable to the county of New York; and that was probably the case while chapter 578 of the Laws of 1866 remained in force. (Vol. 2, Laws of 1866, 1242.) But that was expressly repealed by section 6 of chapter 175 of the Laws of 1870 (Vol. 1, Laws of 1870, 458); and that section declared that the act of April 16, 1857, should be and remain in full force and effect throughout the State, so far as it was not inconsistent or in conflict with the provisions of the act of 1870. It is not objected that any conflict or inconsistency exists between section 14 of the act of 1857, being the one already referred to, and the provisions contained in the act of 1870. But as a large number of acts were passed on the 16th of April, 1857, and the particular act intended to be revived was not mentioned in section 6 of the act of 1870, it is objected that this section did not have the effect of rendering the act regulating the sale of strong and spirituous liquors and wines, passed on that day, applicable to the city and county of New York. The reference to the act designed to be affected by this provision, was by no means certain or definite in its character. But as the act repealed by the section mentioned, modified in important respects the act regulating the sale of liquors and wines, enacted in the year 1857, it is evident that the latter was what the legislature intended to be understood by the reference it made to the act passed April 16, 1857. It was the only act passed on that day in any way relating to or affecting the sale of strong or spirituous liquors or wines; and as the act of 1870 regulated the same subject in part, its

adoption must have been intended, by the provision which was made by that act, for the restoration of the preceding law, as long as both were required for the completion of the system. Even though the reference was obscure, as long as the intent of the legislature was manifested with reasonable clearness, the statute should be construed so as to carry it into effect. But, even if the reference was so uncertain as to be incapable of being maintained, the result would not be of the slightest benefit to the plaintiff in error, for the act of 1857 was revived by the mere repeal of the act of 1866. The rule upon that subject is, that when a statute repealing a preceding statute is itself repealed, the original act is revived, and continues in force from that time. (Sedgwick on Statutory and Const. Law, 137, and cases referred to.) In either view, the objection taken is without the least color of support. No doubt can be entertained that the section of the act of 1857, already quoted, was applicable to the city of New York when the sale was made for which the conviction was had.

The indictment was in the usual form for the sale of spirituous liquor or wine without license. (*Hodgman v. People*, 4 Denio, 235; *People v. Townsey*, 5 id., 70.) It contained the averment in the first count that the sale was made in the ninth ward of the city of New York, to be drunk in the house, store, shop and place of the seller, the plaintiff in error. And that was all that was required in this respect to bring the case within the restraint imposed by the statute. (Whart. Am. Crim. Law [4th ed.], §§ 277, 284.) It fully apprised the plaintiff in error of the nature of the accusation made, and of the time and place where it would be claimed by the prosecution the offence had been committed by him. The fact that the commissioners had not determined the amount which should be charged for licenses, was no defence to the indictment. The offence consisted in selling without license, with liberty to the purchaser to drink the article sold in the house or shop of the seller. It was in no respect rendered dependent on the conduct of the commissioners, but resulted solely from that of the accused.

The objection taken to the proof given by the prosecution to show that the seller had no license, cannot be sustained; for no such proof was required to be given to make out the

people's case. (Greenleaf on Evidence [7th ed.], § 79; *Fleming v. People*, 27 N. Y., 329, 334.) And defective evidence as to the fact, even if it had been given, could work no possible injury to the accused; and besides that, he himself swore that he had no license.

An exception was taken to the refusal of the court to charge the jury that they must acquit the accused, because the prosecution failed to prove that the wine sold was of an intoxicating nature. The instruction was properly declined, because the statute did not require that to be shown in order to create the offence charged. By the provision made upon this subject, if strong or spirituous liquor or wine was sold, to be drank in his house, shop, out-house, yard, or garden appertaining thereto, by the accused, without license, the case was made out. The statute did not require the wines to be shown to be intoxicating for that purpose. It is sufficient if wine to be drank be sold under the prohibited circumstances. The case of *Commissioners of Excise v. Taylor* (21 N. Y., 173), affords the plaintiff in error no assistance on this point. The court, in directing that, did not hold that proof was required that the article was intoxicating, when the subject of the sale was either strong or spirituous liquor or wine, but it was there held that strong beer was included in the terms strong or spirituous liquors. The law, in plain terms, prohibited the sale of wine in quantities less than five gallons, to be drank on the premises of the seller, when it was made without license. This included all wines used for drinking. And the terms, as well as policy of the law restrained the business to those persons alone who should be licensed to carry it on. The proof tended to show that the accused sold wine in a less quantity than five gallons, to be drank in his house and shop; and that was sufficient, if the jury believed the evidence, as long as he had no license to make out the case against him.

An exception was taken to certain comments made in the charge, on the evidence given by the informer, indicating the necessity which existed for the employment of such persons, to secure the enforcement of the law, and to require persons selling wines and liquors in small quantities to take out licenses. These comments were not designed to, and did not, withdraw the credit which might be due to the witness,

from the decision and control of the jury. On the contrary, they were informed that such evidence was ordinarily to be carefully scrutinized, and that they were the sole, exclusive and uninfluenced judges of the credit to be given to it. With this qualification, nothing was said which was not within the peculiar province of the court, or that the accused had the least reason to complain of. (*Jackson v. Packard*, 6 Wend., 415; *Durkee v. Marshall*, 7 id., 312.) The case was correctly disposed of by the Court of Oyer and Terminer, and the judgment should be affirmed.

DAVIS, P.J., and BRADY, J., concurred.

Judgment affirmed.

SUPREME COURT OF THE UNITED STATES.

1875.

UNITED STATES V. NORTON.

The accused was indicted for embezzling, at different times, money belonging to the money-order office in the city of New York, he being a clerk therein at the times when the alleged crimes were committed. The indictment was based upon the eleventh section of the "Act to establish a postal money-order system," passed May 17, 1864.

The indictment was found on the 21st of February, 1874, and the accused pleaded, "that the several offences did not arise, exist, or accrue, within two years next before the finding of said indictment." To this plea the United States demurred. Upon the sufficiency of this plea the judges were divided in opinion, and such division of opinion between the judges of the Circuit Court of the United States for the Southern District of New York, was certified.

The "Act for the punishment of certain crimes against the United States," passed 30th of April, 1790, declares, "Nor shall any person be prosecuted, tried or punished for any offence not capital, nor for any fine or forfeiture under any penal statute, unless the indictment or information for the same shall be found or instituted within two years from the time of committing the offence or incurring the fine or forfeiture aforesaid." The act of the 26th of March, 1804, in addition enacts, "that any person guilty of crimes arising under the revenue laws of the United States, or incurring any fine or forfeiture by breaches of said laws, may be prosecuted, tried and punished, provided the indictment or information be found at any time within five

years after committing the offence or incurring the fine or forfeiture, any law or provision to the contrary notwithstanding."

Held, that the substantial question presented is, which of these two provisions applies to a bar to a prosecution for the offences described in the indictment in connection with the further question, whether the "Act to establish a postal money-order system" is a revenue law within the meaning of the third section of the act of 1804.

Held, further, that the offences charged in the indictment, were crimes arising under the money-order act, and, that neither the title or the sections of that act indicate that Congress, in enacting it, had any purpose of revenue in view. Its object, as expressly declared at the outset of the first section, was "to promote public convenience, and to insure greater security in the transmission of money through the United States mails," and, therefore, defendant cannot be prosecuted, tried, or punished, unless the indictment shall have been found within two years from the time of the committing the offences; and that the indictment is not for crimes arising under the revenue laws, within the intent and meaning of the third section of the act approved March 26, 1804.

Edwin B. Smith, Assistant Attorney-General, for the United States.

Abram Wakeman, for the defendant.

Mr. Justice SWAYNE, delivered the opinion of the court.

It appears by the record that Norton was indicted for the embezzlement, at different times, of money belonging to the money-order office in the city of New York, he being a clerk in that office when the crimes were committed.

The indictment was found on the 21st of February, 1874. He pleaded "that the several offences did not arise, exist, or accrue within two years next before the finding of said indictment." To this plea the United States demurred. Upon the point thus presented, as to the sufficiency of the plea, the judges were divided in opinion.

The indictment was founded upon the eleventh section of the "Act to establish a postal money-order system," passed May 17, 1864, 13 Stat. 76.

The "Act for the punishment of certain crimes against the United States," of the 30th of April, 1790 (1 Stat. 119, sect. 32), declares, "Nor shall any person be prosecuted, tried, or punished for any offence not capital, nor for any fine or forfeiture under any penal statute, unless the indictment or information for the same shall be found or insti-

tuted within two years from the time of committing the offence or incurring the fine or forfeiture aforesaid."

The act of the 26th of March, 1804, "in addition to the act entitled 'An Act for the punishment of certain crimes against the United States'" enacts (2 Stat. 290, sect. 3) "that any person guilty of crimes arising under the revenue laws of the United States, or incurring any fine or forfeiture by breaches of said laws, may be prosecuted, tried, and punished, provided the indictment or information be found at any time within five years after committing the offence, or incurring the fine or forfeiture, any law or provision to the contrary notwithstanding."

The substantial question presented for our determination is, which of these two provisions applies as a bar to a prosecution for the offences described in the indictment? The solution of this question depends upon the solution of the further question, whether the "Act to establish a postal money-order system" is a revenue law within the meaning of the third section of the act of 1804.

The offences charged were *crimes arising* under the money-order act. The title of the act does not indicate that Congress, in enacting it, had any purpose of revenue in view. Its object, as expressly declared at the outset of the first section, was "to promote public convenience, and to insure greater security in the transmission of money through the United States mails." All moneys received from the sale of money-orders, all fees received from selling them, and all moneys transferred in administering the act, are "to be deemed and taken to be money in the treasury of the United States."

The Postmaster-General is authorized to allow the deputy-postmasters at the money-order offices, as a compensation for their services not exceeding one-third of the whole amount of fees received on money-orders issued," and at his option, in addition, "one-eighth of one per cent. upon the gross amount of orders paid at the office." He was also authorized to cause additional clerks to be employed, and paid out of the proceeds of the business; and, to meet any deficiency in the amount of such proceeds during the first year, \$100,000, or so much of that sum as might be needed, was appropriated.

There is nothing in the context of the act to warrant the belief that Congress, in passing it, was animated by any other motive than that avowed in the first section. A willingness is shown to sink money, if necessary, to accomplish that object.

In no just view, we think, can the statute in question be deemed a revenue law.

The lexical definition of the term *revenue* is very comprehensive. It is thus given by Webster: "The income of a nation, derived from its taxes, duties, or other sources, for the payment of the nation's expenses."

The phrase *other sources* would include the proceeds of the public lands, those arising from the sale of public securities, the receipts of the Patent Office in excess of its expenditures, and those of the Post-office Department, when there should be such excess as there was for a time in the early history of the government. Indeed, the phrase would apply in all cases of such excess. In some of them the result might fluctuate; there being excess at one time, and deficiency at another.

It is a matter of common knowledge, that the appellation *revenue laws* is never applied to the statutes involved in these classes of cases.

The Constitution of the United States, art. 1, sect. 7, provides that "all bills for raising revenue shall originate in the House of Representatives." The construction of this limitation is practically well settled by the uniform action of Congress. According to that construction, it "has been confined to bills to levy taxes in the strict sense of the words, and has not been understood to extend to bills for other purposes which incidentally create revenue." Story on the Const., section 880. "Bills for raising revenue," when created into laws, become *revenue laws*. Congress was, a constitutional body sitting under the Constitution. It was, of course, familiar with the phrase "bills for raising revenue," as used in that instrument, and the construction which had been given to it.

The precise question before us came under the consideration of Mr. Justice Story, in the *United States v. Mayo*, 1 Gall. 396. He held that the phrase *revenue laws*, as used

in the act of 1804, meant such laws "as are made for the direct and avowed purpose of creating revenue or public funds for the service of the government." The same doctrine was reaffirmed by that eminent judge, in the *United States v. Cushman*, 1 Gall. 426.

These views commend themselves to the approbation of our judgment.

The cases of *United States v. Bromley*, 12 How. 88, and *United States v. Fowler*, 4 Blatch. 311, are relied upon by the counsel for the United States. Both those cases are clearly distinguishable, with respect to the grounds upon which the judgment of the court proceeded, from the case before us. It is unnecessary to remark further in regard to them.

It will be certified as the answer of this court to the Circuit Court, that the indictment against Norton charges offences for which, under the limitation provided in the thirty-second section of the act of Congress approved April 30, 1790, entitled "An Act for the punishment of certain crimes against the United States," the defendant cannot be prosecuted, tried, or punished, unless the indictment shall have been found within two years from the time of the committing of the offences; and that the indictment is not for crimes arising under the revenue laws, within the intent and meaning of the third section of the act approved March 26, 1804, entitled "An Act in addition to the act entitled 'An Act for the punishment of certain crimes against the United States.'"

COURT OF APPEALS.

NEW YORK, 1878.

THE PEOPLE V. BROWN.

The defendant was indicted for forgery and was tried and convicted in the Court of Sessions of Ontario county. The judgment was reversed by the General Term in the fourth Judicial Department, and error was brought by the People to this court.

Upon the trial the defendant presented himself as a witness in his own behalf, and was sworn. Upon his cross-examination he was asked "How many times have you been arrested?" To this question the counsel for the defendant objected, stating as his objections, that it was incompetent to affect his credibility as a witness; that it tended to degrade the witness; that he was privileged from answering it, as it had no direct bearing upon the issue in the case; and that better evidence of the fact existed. The court overruled the objection and the witness answered "five times, I believe."

Held, that while it would not be competent to introduce evidence of particular facts to impeach the witness, yet the authorities recognize a distinction between independent evidence introduced for the purpose of impeaching a witness, and the questions which are permitted, in the discretion of the court, to be put to a witness, tending to affect his *credibility*. It was permissible to ask the defendant questions as to particular facts, although such evidence would not be received from impeaching witnesses, but the evidence sought to be obtained must legitimately tend to impair the credit of the witness for veracity, either directly or by its tendency to establish a bad moral character.

Held, that the general rule is, that a party cannot avail himself of an error in allowing or refusing a privileged question put to a witness, yet where the witness is also the party, there is no reason for the application of the rule. By taking the stand as a witness, he is not thereby deprived of his rights as a party, and it follows that his counsel, while he is in the witness-box, has a right to speak for him, and that an error committed by the court against him may enure to his benefit as a party. The witness was privileged from answering the question, and the objection was well taken by his counsel, and the exception is available.

Held, that neither in the *Brandon Case* (42 N. Y., 265), *Connor's Case* (50 N. Y., 240), nor in the *Real Case* (42 N. Y., 270), was this question of privilege presented, or decided.

Frank Rice, for the people.

E. W. Gardner, for the defendant.

CHURCH, Ch. J. The defendant in error, while upon the stand as a witness in his own behalf, was asked on cross-

examination the following question: "How many times have you been arrested?" This was objected to on the ground that it was incompetent to affect his credibility as a witness; that it tended to degrade the witness; and that he was privileged from answering it, as it had no direct bearing upon any issue in the case; and also upon the ground that better evidence of the fact existed. The court overruled the objection, and the answer was given "five times, I believe."

The General Term held this to be error, upon the ground that it was not competent evidence bearing upon the credibility of the witness. It would not be competent to introduce evidence of particular facts to impeach the witness; but the authorities recognize a distinction between independent evidence introduced for the purpose of impeaching a witness, and the questions which are permitted, in the discretion of the court, to be put to a witness, tending to affect his credibility. (*Brandon v. The People*, 42 N. Y., 265-268; 1 Green. on Ev., §§ 456, 461.)

I think it was permissible to ask the defendant in error questions as to particular facts, although such evidence would not be received from impeaching witnesses. But I agree with the learned judge, who delivered the opinion of the court below, that the evidence sought to be obtained must legitimately tend to impair the credit of the witness for veracity, either directly or by its tendency to establish a bad moral character. I deem it unnecessary in this case to determine whether this evidence would or would not have that effect, because another objection was distinctly taken, upon the ground of privilege, which I think fatal. I understand it to be conceded by the counsel for the people that this objection would be valid if it had been taken by the witness himself instead of the counsel, and the case shows that the county judge entertained the same view. Such is the rule as to a witness who is not himself a party. It is, then, a question between the witness and the court, with which the party has nothing to do, and with which the counsel of the party has no right to interfere. (*Cloyes v. Thayer*, 3 Hill, 564; *Southard v. Rexford*, 6 Cow., 254, and cases cited.)

The party cannot avail himself of an error in allowing or refusing the privilege. But when the witness is also the

party, I see no reason for the application of this rule. By taking the stand as a witness, while he may subject himself to the rules applicable to other witnesses, he is not thereby deprived of his rights as a party, and it follows that his counsel, while he is in the witness-box, has a right to speak for him, and that an error committed by the court against him may enure to his benefit as a party. Especially ought this protection to be afforded to persons on trial for criminal offences, who often by a species of moral compulsion are forced upon the stand as witnesses, and being there are obliged to run the gauntlet of their whole lives on cross-examination, and every immorality, vice or crime of which they may have been guilty, or suspected of being guilty, is brought out ostensibly to affect credibility, but practically used to produce a conviction for the particular offence for which the accused is being tried, upon evidence which otherwise would be deemed insufficient. Such a result is manifestly unjust, and every protection should be afforded to guard against it.

I am of opinion that the witness was privileged from answering the question and that the objection was well taken by his counsel, and that the exception is available to him. Neither in the *Brandon Case* (42 N. Y., 265) nor in the *Connor Case* (50 N. Y., 240) was the question of privilege presented, and in the latter case the objection was put upon the constitutional ground that the prisoner could not be compelled to be a witness against himself, which was overruled on the ground that having voluntarily become a witness without raising the question of compulsion, he waived the constitutional protection, and rendered himself amenable to the obligations of a witness. The question was not presented whether the evidence sought would tend to affect credibility, and in the *Brandon Case* the objection was put specifically upon the ground that the character of the witness who was a party could not be attacked, as she had not put it in issue, and the court merely held that having offered herself as a witness in her own behalf, she was subject to the same rules as other witnesses. In the *Real Case* (42 N. Y., 276) the witness was not a party, and the privilege of not answering was offered to him by the court.

I am of the opinion that the cross-examination of persons

who are witnesses in their own behalf, when on trial for criminal offences, should in general be limited to matters pertinent to the issue, or such as may be proved by other witnesses. I believe such a rule necessary to prevent a conviction for one offence by proof that the accused may have been guilty of others. Such a result can only be avoided practically by the observance of this rule.

There are other exceptions which might be noticed, but as a new trial must be had, it is not deemed necessary, as the same questions may not again arise.

The judgment of the General Term must be affirmed.

All concur, except FOLGER, J., not voting; EARL, J., concurs in result.

Judgment affirmed.

SUPREME COURT.

First Department—New York, 1875.

WIGGINS V. THE PEOPLE.

The prisoner was tried and convicted, in the Court of General Sessions of the county of New York, for grand larceny, and sentenced to the State prison for the term of five years. The facts shown upon the trial were, that by means of a trick or device the owner of eight hundred pounds of butter was induced to send it by express and steamer, from Alton, Wayne county, to New London, in Connecticut, addressed to Peter Y. Clark & Co., and to draw a sight draft for the amount of the price on A. A. Greeley & Co., at Middletown, in the same State. The butter reached New London and from there it was sent to New York city, and went into the possession of the accused. The prosecution attempted to show that the firms named as purchasers of the property and drawee of the draft, were fictitious, and did not exist at the time when the property was ordered and sent forward. To prove this the people produced as a witness, Bradshaw, the complainant. Under objection, on the part of the accused, he testified, in substance, that the day preceding the trial, he went to New London and Middletown, and made inquiries, and from those inquiries, ascertained that neither of these firms existed, either at the time, or when the butter was ordered. The court remarked that this testimony was admissible, to which decision an exception was taken.

Held, that the admission of such evidence was a fatal error. The evidence given by the witness as proof of facts, was not his own observations or

knowledge, but simply the unsworn statements and reports of other persons, who were not before the court, and could not be examined or cross-examined to determine the accuracy of what they had related. To allow evidence of that description as proof of material facts, would be unjust to the accused, and would subject him to a trial by witnesses not confronted by him and without even the semblance of an oath or affirmation. The question was whether what the persons stated to Bradshaw was true; not whether he truthfully repeated what they had said to him. It was a trial of the accused upon what the law denominates hearsay evidence.

John O. Mott, for the accused.

Benj. K. Phelps, district attorney, for the people.

DANIELS, J. The prisoner was indicted, tried and convicted of the crime of grand larceny. It was committed by means of a trick or device, by which the owner of the property was induced to send it by express or steamer, from Alton, in Wayne county, to New London, in Connecticut, addressed to Peter Y. Clark & Co., and to draw a sight draft for the amount of the price on A. A. Greeley & Co., at Middletown, in the same State. The butter, which was the property sent forward, soon afterward reached New London, from whence it was immediately returned to New York, where it went into the possession of the prisoner. It was the theory of the prosecution, that he procured the property by feloniously applying for its purchase in the name of Peter Y. Clark & Co., to be paid for by a sight draft on A. A. Greeley & Co., when there were no such firms as those names imported the existence of, but the names were made use of, simply for the purpose of deceiving the seller. The prosecution, to make out the people's case, undertook to prove, as it was important it should, that the firms named as purchasers of the property and drawee of the draft, were fictitious. To prove that, Bradshaw, the complaining witness, was subjected to an extended examination. He sent the property forward to New London, early in October, 1874, and the trial was had on the thirteenth of November following. The day preceding the trial he went to Middletown and New London, and from various inquiries then made by him, ascertained that neither of these firms existed, either at that time, or when the butter was ordered of him; and the prosecution proposed and was

allowed to prove these facts, by showing the inquiries which had been made, and the information received by means of them. The important circumstance to be shown in the case was, that these firms did not exist at the time when the property was ordered and sent forward, and for the purpose of establishing it, the witness was allowed to state the inquiries made by him, and the answers secured, both as to the day preceding the trial, and the time when the butter was ordered. The prisoner's counsel objected to the questions propounded to the witness in order to elicit this proof, and a number of exceptions were taken to the rulings made upon them by the court. He finally asked the court to allow him to renew the objections previously made to the conversations between the witness and the persons he conversed with in Connecticut. The court in response stated that he should be considered as objecting and excepting to everything, and with that announcement the witness proceeded with his relation of what had transpired. In the course of it he was asked whether he limited the inquiries made at Middletown to the time of the butter transaction, and answered, that he asked if there was or had been such a firm. He was also asked for the result, and stated it to be, that there was no such firm, and had not been as A. A. Greeley & Co., at Middletown. It is unnecessary to discuss the proposition, whether an exception taken in this manner will present the point of the admissibility of the evidence given, though it probably would under the circumstances which existed when it was made. For the same point was specifically raised upon the proof which was offered and received concerning the inquiries made in New London. The witness mentioned several persons of whom he had there inquired concerning the existence of the firm of Peter Y. Clark & Co., and stated that they all gave him but one answer, which was, that there was no such firm there, and never had been, as Peter Y. Clark & Co. The court then remarked that this was admissible, and the prisoner's counsel excepted to the decision. The question is therefore presented, whether the answers given to the questions propounded near the middle of November, could be lawfully and properly received as competent evidence to prove that either one or both of these

firms did not exist in the early part of the preceding October. The facts to be proven were that neither did exist at that time, and all the information the witness endeavored to obtain, and the statements he repeated in the evidence given by him, were in support of that conclusion. And the evidence given by the witness as proof of these facts, was not his own observations or knowledge, but simply the unsworn statements and reports of other persons who were not before the court, and could not be examined or cross-examined to determine the accuracy of what they had related. To allow evidence of that description as proof of material facts required to be established to sustain a criminal prosecution, would be extremely unjust and dangerous to the accused. It would subject him to a trial by witnesses not confronted by him, permitted to give their evidence without even the semblance of an oath or affirmation. The important inquiry in the case was, whether what the persons stated to Bradshaw was true; not whether he truthfully repeated what they had said to him. If it was, then the fact was as the prosecution claimed it to be, and the substantial means for its determination consisted of unsworn statements made in answer to his questions. It was a trial of the accused upon what the law denominates hearsay evidence, which, though admissible for certain exceptional purposes, in controversies affecting certain notorious public interests, and in some other cases, has always been rejected as proof of material and particular facts capable of being proved by the positive evidence of persons having actual knowledge on the subject. (1 Greenl. on Ev. [12th ed.], § 99; *Queen v. Hepburn*, 7 Cranch, 290, 295; Roscoe on Crim. Ev. [6th ed.], 268; *Jackson v. Etz*, 5 Cowen, 314, 319, 320.)

Cases have been referred to in support of the ruling made at the trial, as at least countenancing the course there adopted. But a brief reference to them will render it entirely manifest that they do no such thing. In *Foulke v. Sellway* (3 Esp., 236), the reports allowed to be shown concerned the plaintiff's character, which the law uniformly permits to be proved substantially in that way. This forms a well established exception to the general rule. In *Jones v. Perry* (2 id., 482), the truth of the rumors that the dog was mad was not important. It was the fact of their exist-

ence which alone was material; and where that is the case they may be proved like any other circumstance involved in the controversy. They influenced the conduct of the party, and whether true or false the effect on him would be the same, while in the present case the truth of the reports, and not their mere existence, was the important thing to be shown. *Morgan v. Morgan* (9 Bing., 359) is a case included in the same principle, and so is *Bartlett v. Decreet* (4 Gray, 111). The inquiry was, whether the statements in the one case, and the repute in the others, existed; not whether they were true or untrue. Neither of these authorities lends the least support to the ruling by which the evidence referred to was received in the present case, and in view of the clearly defined and well established rule on this subject, by which hearsay evidence, as proof of facts which can be otherwise readily established, is commonly rejected, there is not the least probability that any well considered case sustaining it can be found. The accused may very well be, and probably is, guilty of obtaining the property mentioned in the indictment, by criminal means. But, even if that be the case, he can only be lawfully convicted of the offence by legal evidence. This was not done in this case, and the judgment should therefore be reversed and a new trial ordered.

DAVIS, P. J., and BRADY, J., concurred.

Judgment reversed, and new trial ordered.

COURT OF APPEALS.

NEW YORK, 1878.

THE PEOPLE v. CASEY.

The defendant was convicted, in the Court of Sessions of the county of Rensselaer, upon an indictment charging him with a felonious assault upon one John H. O'Brien, with a sharp, dangerous weapon, with intent to do bodily harm, and without justifiable or excusable cause, and the verdict of the jury was "guilty of the felony whereof he was charged." The defendant was sentenced to the State prison, for a term of five years. After the sentence the prisoner, upon the indictment, evidence, proceedings in the trial, and upon affidavits, moved the court for a new trial upon the merits, and upon the ground of surprise and newly discovered evidence, and also upon the ground, that the sentence and conviction were erroneous, illegal, excessive and against the evidence and the weight of evidence. This motion was denied. The prisoner then obtained a writ of error and a writ of *certiorari*, and the record and all the proceedings upon the motion for a new trial were returned to the Supreme Court, where the judgment of the Sessions was affirmed. The prisoner on a writ of error comes into this court.

Held, that the writ of *certiorari*, only brought the proceedings upon the motion for a new trial before the Supreme Court for review, and there its office ceased. The writ of error for review in this court does not bring those proceedings with it; they are no part of the record.

Held, that the conviction was obtained under the act of 1854, as the indictment alleges that the instrument used was "sharp, dangerous," that the assault was made with intent "to do bodily harm," and that it was "without justifiable or excusable cause." These allegations were all necessary under the act of 1854 but not under the act of 1866. Whether the instrument used in the commission of the crime was sharp or not was matter of proof as alleged, upon the trial. It is sufficient, to uphold the indictment, that at least one of the instruments mentioned in the statute and alleged in the indictment, was commonly known as sharp. The jury were correctly charged that they could not convict the prisoner unless they found the instrument used was sharp and dangerous.

The court refused to charge that "if the jury can satisfactorily account for the wound on O'Brien's head in any other manner than by an assault by the prisoner with such a weapon as is named in the indictment, it is their duty to acquit the prisoner," but did charge that they might or might not convict him of simple assault and battery.

Held, that in this there was no error. In an indictment for assault and battery it is not necessary to specify any instrument with which the crime was committed; and if the instrument be specified it is mere surplusage which may be disregarded, and need not be proved upon the trial. Hence, the prisoner could have been convicted of a simple assault and battery, even if

the jury had found that he did not use either of the instruments specified in that indictment.

On the trial the accused was sworn in his own behalf, and upon cross-examination the counsel for the people was permitted, under objection, to question him as to other altercations in which he had been engaged, and other assaults which he had committed.

Held, that this permission was not objectionable. When a prisoner offers himself as a witness, in his own behalf, he is subject to the same rules upon cross-examination as other witnesses. He may be asked questions disclosing his past life and conduct, and thus impairing his credibility. The extent to which such an examination may go to test the witness' credibility is largely in the discretion of the trial court. In *The People v. Irving*, 2 N. Y. Crim. Rep., 171, that principle was recited and affirmed.

R. A. Parmenter, for the people.

Melville Smith, for the accused.

EARL, J. The prisoner was indicted under the act (chap. 74 of the Laws of 1854) for an assault with a "certain knife, pistol, slung-shot, billy and club," a sharp, dangerous weapon, with intent to do bodily harm. That act provides, that "any person who, with intent to do bodily harm, and without justifiable or excusable cause, shall hereafter commit any assault upon the person of another with any knife, dirk, dagger, or other sharp, dangerous weapon," shall, upon conviction, be punished by imprisonment in a State prison for a term not more than five years, or by imprisonment in the county prison for a term not exceeding one year. The defendant was found guilty and sentenced to the State prison for a term of five years. Some days after the sentence the prisoner, upon the indictment and upon the evidence and proceedings in the trial, and upon affidavits, moved the court for a new trial upon the merits, and upon the ground of surprise and newly discovered evidence, and also upon the ground that the sentence and conviction were erroneous, illegal, excessive and against the evidence and the weight of evidence. This motion was made under chapter 339 of the Laws of 1859, the fourth section of which provides, that the "Courts of Sessions of the several counties in this State shall have power to grant new trials upon the merits, or for irregularity, or on the ground of newly discovered evidence in all cases tried before them." The motion was denied. The prisoner then obtained a writ of error

and a writ of *certiorari* from the Supreme Court, addressed to the Court of Sessions, and the record and all the papers and proceedings upon the motion for a new trial were returned to the Supreme Court, and there the judgment of the Sessions was affirmed. The prisoner then obtained a writ of error returnable to this court.

The writ of *certiorari*, if it performed any office at all, only brought the proceedings upon the motion for a new trial before the Supreme Court for review; its office ended there. The writ of error for review in this court does not bring those proceedings before us. They are no part of the record, which consists of the indictment, bill of exceptions and judgment; they are subsequent to judgment, and the papers in them are on the files of the court, but form no part of the record, and such papers are not brought before us upon writ of error. That reaches only to errors in the record. (1 Bish. on Cr. Pro., § 1196; 2 R. S., 741, § 20; *Willis v. People*, 32 N. Y., 715; *Gaffney v. People*, 50 id., 413.) It is needless for us, therefore, only to consider such allegations of error as are founded upon the record. It is contended that the indictment is fatally defective for duplicity in charging in one count two distinct offences; one under the law of 1854, and another under the act, chapter 716 of the Laws of 1866. Section one of the latter act provides, that "every person who shall within this State use, or attempt to use, or with intent to use against any other person, shall knowingly and secretly conceal on his person, and with like intent shall wilfully and furtively possess any instrument or weapon of the kind commonly known as slung-shot, billy, sand-club or metal-knuckles, and any dirk or dagger (not contained as a blade of a pocket-knife), or sword-cane or air-gun, shall be deemed guilty of felony, and on conviction thereof may be punished by imprisonment in the State prison or penitentiary or county jail, for a term not more than one year." It will be seen by comparing the two acts that this indictment is under the first one. It alleges that the instrument used was "sharp, dangerous;" that the assault was made with intent "to do bodily harm," and that it was "without justifiable or excusable cause." These allegations were all necessary under the first act, but not under the last. It matters not that some of the instru-

ments alleged in the indictment could not very well be sharp, within the meaning of the act; but they were all alleged to be sharp, and whether the instrument used was sharp or not was matter to be proved as alleged upon the trial. It is sufficient to uphold the indictment that at least one of the instruments alleged to have been used is one commonly known as sharp, and one of those mentioned in the statute. The case was fairly submitted to the jury by the trial court. They were charged that they could not convict the prisoner, under the act of 1854, unless they found the instrument used was sharp and dangerous.

The prisoner's counsel requested the court to charge that "if the jury can satisfactorily account for the wound on O'Brien's head in any other manner than by an assault by the prisoner with such a weapon as is named in the indictment, it is their duty to acquit the prisoner." This was refused, and the court charged that, in that event, they might or not convict of simple assault and battery. In this there was no error. It is not disputed that there could, under this indictment, have been a conviction for a simple assault and battery. In an indictment for assault and battery it is not necessary to specify any instrument with which the crime was committed (Archibald's *Crim. Pl. & Pr.* [10th Lond. ed.], 441); and if the instrument be specified it is mere surplusage which may be disregarded, and need not be proved upon the trial. Hence, the prisoner could have been convicted of a simple assault and battery, even if the jury had found that he did not use either of the instruments specified in the indictment.

Upon the trial the prisoner was a witness in his own behalf, and it is now complained that the counsel for the people upon cross-examination, was permitted to question him as to other altercations in which he had been engaged, and other assaults which he had committed. This complaint is not well-founded. When a prisoner offers himself as a witness, in his own behalf, he is subject to the same rules upon cross examination as any other witness. He may be asked questions disclosing his past life and conduct, and thus impairing his credibility. Such questions may tend to show that he has before been guilty of the same crime as that for which he is upon trial; but they are not upon

that account incompetent. When he offers himself as a witness, and seeks to take the benefit of the statute which authorizes him to testify in his own behalf, he takes the hazard of such questions. He must determine before he offers himself, whether his examination will benefit or injure him. The extent to which such an examination may go to test the witness' credibility is largely in the discretion of the trial court. (*Allen v. Bodine*, 6 Barb., 383; *Fralich v. People*, 65 id., 48; *Real v. People*, 42 N. Y., 270.)

There is no exception in the record which raises the objection that there was no evidence which warranted the conviction, and we cannot, therefore, entertain it. (*People v. Dalton*, 15 Wend., 581; *Gaffney v. People*, *supra*.) As the record is made up, there is certainly very little, if any, evidence that the assault was made with a sharp instrument. The jury found that it was. The prisoner made a motion for a new trial, which was denied. It appears to be quite clear that the assault was made with some blunt instrument; but it is the misfortune of the prisoner that no objection was made or exception taken which will enable us to consider this matter. The bill of exceptions is only required to contain so much of the evidence given as is pertinent to the exceptions taken, and it would not be proper for a court of review upon writ of error, upon the assumption that all the evidence is returned, to assume the power to pass upon the merits. The indictment, conviction and sentence should probably have been under the act of 1866, but the defendant must apply for relief to the executive department of the government. There is no error upon which we can base any relief, and the conviction must be affirmed.

All concur, except ALLEN and MILLER, JJ., dissenting upon ground of error in admission of evidence.

Judgment affirmed.

COURT OF APPEALS.

NEW YORK, 1878.

PHELPS V. THE PEOPLE.

The accused was convicted by the Court of Oyer and Terminer held in Albany county, of the crime of forgery in the third degree. The General Term of the Third Department affirmed the judgment entered upon such verdict of conviction.

The accused was a clerk of the Treasurer of the State of New York and his duties were to receive moneys and securities belonging to the State, which came to the hands of the Treasurer, and to deposit them in bank; to keep the accounts between the State and the deposit banks, and other banks. The charge was in having made a false entry in a book of accounts kept in the office of the State Treasurer, whereby, in an account in such book between the Treasurer and the Mechanics and Farmers' Bank of Albany, the latter was debited with a deposit or transfer of the sum of \$200,000. The false entry in question was made on the 31st of August, 1873.

The accused was indicted under section thirty-four of 2 Revised Statutes, 673, which provides, that "every person who, *with intent to defraud*, shall make any false entry, or shall falsely alter any entry made, in any book of accounts kept in the office of the Comptroller of this State, or in the office of the Treasurer, or of the Surveyor-General, or of any county treasurer, by which any demand or obligation, claim, right or interest, either against or in favor of the people of this State, or any county or town, or any individual, shall be, or shall purport to be, discharged, diminished, increased, created, or in any manner affected, shall, upon conviction, be adjudged guilty of forgery in the third degree."

The indictment, in some of the counts, charged the alleged false entry to have been made, with the intent to defraud the Mechanics and Farmers' Bank of Albany, and in others, with intent to defraud the people of the State of New York.

It is claimed by the counsel for the accused, that the entry was made for the sole purpose of concealing his previous defalcations, and if made for that purpose he could not be convicted of the crime of forgery; and that the false entry could not operate to defraud either the State or the bank, and could have no legal tendency to affect any fund, or affect the property, rights, or interests of any one, as the accused never realized, nor could he realize, any sum whatever by making the entry, nor could the State or the bank be losers thereby to any amount.

Held, that this construction of the statute cannot be maintained. The statute requires that the false entry be made with intent to defraud, but it is not necessary that the intent be to obtain money, or cause the loss of money directly by means of the false entry. The words "with intent to defraud" are used as synonymous with the words "with fraudulent intent," or "for a fraudulent purpose," to distinguish the case from one of an erroneous en-

try, made through mistake or under a misapprehension of a right, or such fictitious entries as are sometimes made for book-keeping purposes, or otherwise innocently. Where the false entry was part of a criminal scheme to conceal and temporarily cover up the defalcation of the accused, there was a fraudulent intent sufficient to satisfy the statute. The entry was made on the 31st of August, 1873, covering up previous offences and enabling the accused to continue in his position until the next October. The jury had a right to infer from the evidence, that the entry was made with intent to enable the accused to retain the fruits of his depredations, or to continue them, and that he had continued them, during this interval. The law would attach to the concealment, the intent to accomplish the result to which it naturally tended.

Objection was made, that the false entry was not set out in words and figures.

Held, that the counts are good, being set out in the words of the statute, but as some of the counts did set out a copy of the entry, and as the verdict was a general one, and there being evidence in support of these last counts, it is sufficient to sustain the conviction.

It was objected to on the part of the accused, that there was a variance between the account set forth in the indictment and as proved upon the trial in regard to the entry of \$125,000.

Held, that such entry was nearly six months previous to the date of the false entry, and as it was wholly immaterial, it could not have misled or prejudiced the prisoner.

William J. Hadley, for the accused.

Nathaniel C. Moak, for the people.

RAPALLO, J. The plaintiff in error was convicted of forgery in the third degree, for having made a false entry in a book of accounts kept in the office of the State Treasurer, whereby, in an account in such book between the Treasurer and the Mechanics and Farmers' Bank of Albany, the latter was debited with a deposit or transfer of the sum of \$200,000.

The plaintiff in error was a clerk in the office of the Treasurer, having the title of cashier. His duties were to receive moneys and securities belonging to the State which came to the hands of the Treasurer, and to deposit them in bank; to keep the accounts between the State and the deposit banks, and other accounts. The false entry in question was made on the 31st of August, 1873. In the beginning of October, 1873, he left the office and fled to the State of New Jersey, and it was then discovered that he had misappropriated a large amount of the funds of the State. On the 4th of October, 1873, he wrote to the Treasurer, admitting

his defalcation, and attributing it to serious losses in heavy speculations nearly six months previous, and stating that he had carried the burden so long, from the simple fact that his figures, as to the amount on deposit, had never been questioned; but that complaints made by the banks the week previous, and the consequent investigations, necessitated his avowing that he could not make his account good.

He was indicted under section thirty-four of 2 Revised Statutes, 673, which provides, that "every person who, *with intent to defraud*, shall make any false entry, or shall falsely alter any entry made, in any book of accounts kept in the office of the Comptroller of this State, or in the office of the Treasurer, or of the Surveyor-General, or of any county treasurer, by which any demand or obligation, claim, right or interest, either against or in favor of the people of this State, or any county or town, or any individual, shall be, or shall purport to be, discharged, diminished, increased, created, or in any manner affected, shall, upon conviction, be adjudged guilty of forgery in the third degree."

The indictment contains numerous counts, in some of which the false entry is alleged to have been made with intent to defraud the Mechanics and Farmers' Bank of Albany, and in others, with intent to defraud the people of the State of New York.

The counsel for the plaintiff in error takes the point that the entry was made for the sole purpose of concealing for a time his previous defalcations, and that if made for that purpose he could not be convicted of the crime of forgery. He claims that the false entry could not operate to defraud either the State or the bank, because it could have no legal tendency to effect any fraud, or affect the property, rights, or interests of any one. That he never realized, or could realize, any sum whatever by making the entry, nor could the State or the bank be losers thereby to any amount. This was the theory of the defence, and the point is raised by numerous exceptions to rulings at the trial, to the charge, and to refusals to charge, which it is not necessary to refer to in detail, for in substance they raise the same point stated in different forms.

We do not think that the construction of the statute upon which this point is founded can be maintained. The stat-

ute, it is true, requires that the false entry be made with intent to defraud, but it is not necessary that the intent be to obtain money or cause the loss of money, directly by means of the false entry. The words "with intent to defraud" are used as synonymous with the words, "with fraudulent intent," or "for a fraudulent purpose," to distinguish the case from one of an erroneous entry, made through mistake or under a misapprehension of a right, or such fictitious entries as are sometimes made for book-keeping purposes, or otherwise innocently. When, as in this case, as admitted by the plaintiff in error, the false entry was part of a criminal scheme to purloin the funds of the State, and to conceal and temporarily cover up the defalcation and thus, to use the words of the plaintiff in error, to enable him to "carry the burden" for a long time by means of the reliance placed upon his false figures as to the amount on deposit, and thus continue in a position where the scheme of purloining money would continue, there was a fraudulent intent sufficient to satisfy the statute. The entry in question was made on the 31st of August, 1873, and so covered up the previous offences that the plaintiff in error was enabled to continue in his position until October second or third, when he fled from fear of the discovery which would result from an expected investigation. The jury had a right to infer from the evidence and the letter of October fourth that the entry was made with intent to enable the plaintiff in error to retain the fruits of his depredations, or to continue them, and that he had continued them during this interval. But even if the only purpose the defendant had immediately in view in making the false entry, was to cover up his previous defalcations, the natural effect of such concealment was to delay detection and pursuit, and thus obstruct the State in obtaining redress and restitution. This was in itself an injury. (*Cont. Bank v. Bk. of Commonwealth*, 50 N. Y., 575.) And the law would attach to the concealment, the intent to accomplish the result to which it naturally tended.

The fraudulent intent is so apparent from the evidence, that it is not necessary to follow the learned counsel for the people in his argument, as to the effect which the entry, unexplained, would have as evidence, which might affect

the rights of the State or of the bank, in the contingencies which he has suggested.

Objection was taken on the trial to the form of the first forty-eight counts of the indictment, on the ground that the false entry was not set out in words and figures in those counts, and numerous authorities are cited holding that a copy of the instrument alleged to be forged must be set out in the indictment. This point was raised by objection to receiving the entry in evidence under those counts, by motion to direct the jury to acquit the defendant under them, by a request to charge that the defendant could not be convicted under either of them, and by motion in arrest of judgment.

The allegation in the first count, descriptive of the forged entry, is, that it was "a false entry in a book of accounts commonly called a ledger, kept in the office of the Treasurer of the State of New York, by which a *demand* in favor of the People of the State of New York against The Mechanics and Farmers' Bank of Albany was *created* for the sum of \$200,000." In the succeeding forty-seven counts the language is varied so as to include the several terms used in the statute, viz., demand, obligation, claim, right, interest, increased, affected, etc., etc., and to vary the allegation as to the party intended to be defrauded, etc. The other counts set forth a copy of the false entry.

The counsel for the people claims that the counts objected to are good, being in the words of the statute upon which the indictment is founded; but whether this position be sound or not, he contends that the conviction being general on all the counts, and they being all based upon the same offence, merely varying the description so as to meet the proofs, if there is any one good count in the indictment, it is sufficient to sustain the conviction.

This proposition is fully sustained by the authorities cited by the counsel for the people, and we regard it as settled law. There being evidence in support of the good counts, and the jury having convicted upon them, as well as upon those claimed to be defective, it is clear that it was quite immaterial that the court held the last-mentioned counts to be good, and admitted evidence to sustain them, and refused to direct an acquittal under them, as those ru-

lings could not have varied the result or prejudiced the defendant, and therefore, even if erroneous, are not ground of reversal. (*People v. Gonzalez*, 35 N. Y., 100; *Real v. The People*, 42 id., 270.) The case of *Wood v. The People* (59 N. Y., 117) does not conflict with this rule; that was a prosecution for perjury. Several distinct assignments of perjury were contained in the indictment in a single count. Some of them were not sustained by proof, and others were defective in form, in not showing that the testimony alleged to be false was material to the issue, and the attention of the court was expressly called to these particular assignments, with a request as to each that it be withdrawn from the consideration of the jury. The refusal of these requests was held error, inasmuch as the several assignments charged distinct offences, and the jury might have based their verdict of guilty on the count, upon those assignments which were insufficiently alleged or unsustained by proof of the materiality of the matter falsely sworn to. That case is clearly distinguishable from the present, where but a single offence was attempted to be proved, and a single sentence could be or was imposed, and the several counts were simply different versions of the same transaction. If, in either of the counts, the offence proved and found by the jury was sufficiently set forth, the defendant cannot have been prejudiced by the rulings as to the others.

Exceptions were taken to receiving in evidence the false entry, which was set out in the remaining forty-eight counts, and to the rulings of the court in refusing to direct an acquittal on those counts, or to charge that the defendant could not be convicted under them. The first objection urged to those counts was that they alleged that the false entry was made in a book containing an account between the people and the "*Mechanics and Farmers'*" Bank, and in said account a copy of the false entry is there set forth, and the count proceeds to allege "that *the aforesaid* account between the People of the State of New York and the said '*Farmers and Mechanics'* Bank' of Albany, after such false entry was to the tenor following," etc.

We think this discrepancy in the name of the bank appeared upon the face of the count to be a mere clerical error, which could not possibly have misled or prejudiced the

defendant. The account was accurately stated to have been between the People and the Mechanics and Farmers' Bank. That bank is named throughout the indictment as the party in whose account the false entry was made, and the concluding paragraph referring to the account as "the afore-said account" between the People and the said Farmers and Mechanics' Bank clearly shows that the inaccuracy in repeating the name was an accidental slip, the means of correcting which appear upon the face of the indictment itself.

It was further objected that there was a variance between the account as set forth in the indictment, and as proved upon the trial, in this, that in an entry in such account of \$125,000, the date of the entry is set out in the indictment as November twenty-eighth; whereas it is claimed that in the account proved upon the trial the date is November eighteenth. The entry is in the handwriting of the defendant, and on inspection the figures bear quite as much resemblance to twenty-eight as to eighteen. The court on the trial held, on inspection, that they were twenty-eighth. But this is clearly a frivolous objection, for the part of the account in which these figures are contained has no connection with the false entry, or the portion of the account in which that entry is contained. It relates to a period nearly six months previous to the date of the false entry, and the balance of the account had been struck twice in the meantime. That part of the account in which the alleged variance is contained was wholly immaterial and need not have been set out in the indictment.

The character of the false entry, and its effect upon the account, were fully shown by that part of the account which followed the last balance struck. The alleged variance, if it existed, could not have misled or prejudiced the prisoner, and it was not established as matter of fact.

Numerous exceptions were taken to the charge and to refusals to charge, but they all depend substantially upon the points already discussed. We find none which would justify us in reversing the judgment. The errors assigned by the plaintiff in error relate almost entirely to mere matters of form, to which the provisions of 2 Revised Statutes, 728, § 52, are, in our judgment, applicable. That section provides that no indictment shall be deemed invalid, nor

shall the trial, judgment or other proceedings thereon be affected by certain enumerated defects, nor "by reason of any other defect or imperfection in matters of form which shall not tend to the prejudice of the defendant."

The judgment should be affirmed.

All concur.

Judgment affirmed.

COURT OF APPEALS.

NEW YORK, 1878.

PHELPS v. THE PEOPLE.

The defendant was indicted for the crime of grand larceny and convicted in the Court of Oyer and Terminer held in the county of Albany.

There were two indictments tried by the same court, and two convictions had. One was for stealing a draft for \$7,500, the other for stealing a draft for \$400. The General Term of the Supreme Court, in the third judicial department affirmed both judgments, and error is brought to review them. The prisoner was sentenced to the Albany Penitentiary.

It is claimed that the draft, the subject of the larceny, was not properly described in the indictment, inasmuch as there was no averment in the indictment, that there was any money due upon or secured by the draft, or remaining unsatisfied upon it, or that might in any contingency be collected thereon.

Held, that to steal such an instrument was not larceny at common law, but it is made so by statute. The definition or description of the offence is contained in the statute, and if the indictment avers the offence, as the statute defines it, the averment is sufficient. The rule is, that, while in framing an indictment on a statute, all the circumstances which constitute the definition of the offence in the statute itself, so as to bring the accused precisely within it, must be stated; yet no other description of the thing is necessary to be stated, than that contained in the statute itself, unless the value becomes necessary to fix the grade of the offence. It must be laid in the words of the act creating the offence, or at least in words plainly equivalent. The indictment in this case avers, 1st. The kind of property. 2d. The other of whom it is the property; and, 3d. The value of the property, as over twenty-five dollars. And thus is made a complete averment of all the constituents of the statutory crime of which the prisoner was found guilty.

It is further claimed, that to constitute a good indictment for larceny, it is necessary that the name of the true owner of the thing stolen, if known, should

be stated, and that those named in the indictment, to wit, the State of New York, Thomas Raines, Nelson K. Hopkins, Raines as State Treasurer, nor Hopkins as Comptroller, had any general or special property in the draft, and that it was manifestly improper to aver it to be the property of a person or persons unknown.

Held, that it was of no avail in this case to allege that the draft was the property of a person or persons to the jurors unknown. The grand jury had all the information of ownership which was needed to determine in whom was the ownership.

It is not necessary that the indictment should name that person as owner, and him only, who was the general ownership of the property, a title absolute, which he can maintain against the whole world. It is enough, if any one be named who has a special property in the thing stolen. A special property is a qualified or limited right, such as a bailee of it has, and the special interest acquired by the public agents of the State was the interest of the State, and hence the State obtains and retains the special interest in the property which will sustain an averment of ownership.

The next question to be decided is, whether there was an actual or constructive possession of the draft in the alleged owner, the State of New York, at the time of the taking.

Held, that when property is received by the servant or custodian from another, who occupies the relation of agent for the owner, or who stands in the position of the owner in respect to the possession; then, though the owner never had the actual possession, yet the possession of such other person is his possession. In this case the draft came into the State hall, and went first to the actual possession of Mr. Gallien, the second Deputy Comptroller. Thus it came into the actual possession of a sub-servant of the State, whose actual possession was the possession of the State, who thereby became the special owner of it. It was sent to the accused by a special messenger, a sub-servant of the State who had actual possession of the draft, thus the actual possession of the messenger was the possession of the State, and the delivery of the draft into the custody of the accused for a special purpose, was a delivery by the State to him for that purpose. Thus, he had only the custody or charge of the draft, and if the taking of it by him from the messenger was not a trespass, the carrying it away, having only the bare custody of it, was, and if that carrying of it away was with felonious intent, as the jury have found that it was, it was larceny, for, when the owner has parted with the custody only of the property, and not with the possession, and the servant converts the chattel to his own use, it is larceny, though he had no felonious intent when he received it into his custody.

Held, that the draft was a legal, operative instrument when it reached the hands of the accused; it had been by the original payee indorsed to Mr. Hopkins, as Comptroller.

Held, that the testimony of the conversation with the accused at Jersey City, was properly received. Though it did not particularize this draft, it did show circumstances which might, by inference, include or refer to this.

Held, that the challenge to the juror Lamb was properly overruled. Though some of his answers, taken separately would perhaps have established a

disqualification, yet the effect of all that he said was to show him a proper juror, under the late statutes.

Held, that the accused was legally indicted and convicted, and is justly undergoing the punishment for his unlawful act.

William J. Hadley, for the accused.

Nathaniel C. Moak, for the people.

FOLGER, J. The prisoner was indicted for grand larceny and was convicted thereof and sentenced to the Albany Penitentiary. The article which it was alleged that he stole was an instrument in writing known as a draft, on a bank in New York city, from a savings bank in Lockport, N. Y. It was for \$7,500, made payable to the order of S. Curtis Lewis as county treasurer of Niagara county, indorsed by him, payable to Nelson K. Hopkins, Comptroller, or order. It was further indorsed by Henry Gallien, as Second Deputy Comptroller, payable to the order of the State Treasurer. It was sent by that county treasurer, by mail, from Lockport, to the Comptroller of the State of New York, to be credited to the account of Niagara county, on State tax due from that county to the State. It came to the hands of Gallien, who claimed to act in the receipt of it as a Second Deputy to the Comptroller. It went from his hands, either directly or by the hand of a messenger, to the hands of the prisoner. He converted it to his own use. He was at the time a servant of the State, in the office of the State Treasurer. He was called "cashier". His employment was to receive such drafts and moneys as came to that office, and to make deposits of them daily in bank, at such time in bank hours, after the middle of the day, as suited him. He made no such deposit of this draft.

From the judgment of the General Term, affirming the conviction, a writ of error has been brought to this court.

Upon the facts above stated, and upon others which will appear in this opinion, an able argument has been made in his behalf, which presents some grave and close points.

The first point to be noticed is that which claims that the draft, which was alleged to have been the subject of the larceny, was not properly described in the indictment. The

fault indicated is that there is no averment that there was any money due upon or secured by the draft, or remaining unsatisfied upon it, or that might in any contingency be collected thereon; which is the substance of one of the sections of the Revised Statutes cited below.

To steal such an instrument was not larceny at common law. It is made so by statute. The definition or description of the offence is contained in the statute. If the indictment avers the offence, as the statute defines it, the averment is sufficient. For the rule is, that, while in framing an indictment on a statute, all the circumstances which constitute the definition of the offence in the statute itself, so as to bring the accused precisely within it, must be stated, yet no other description of the thing in which the offence was committed is necessary to be stated, than that contained in the statute itself, unless the value becomes necessary to fix the grade of the offence. (2 Leach, 1103.) And the mode of stating the value, is to aver that the thing which is the subject of the offence is of or more than the value prescribed by the statute as the sum which must be reached in value. It must be laid in the words of the act creating the offence, or at least in words plainly equivalent. (*Per* YEATES, J., 3 Binney, 537, *Spangles v. Comm.*; see, also, 1 Chit. Cr. L., 281; 2 Foster, 284; 2 Leach, 1103.)

The language of the statute is: "Every person who shall be convicted of the felonious taking and carrying away the personal property of another, of the value of more than twenty-five dollars, shall be adjudged guilty of a grand larceny," etc. (2 R. S., 679, § 63.)

There is the offence—the intent, feloniously; the act, taking and carrying away; the subject of the act, personal property of another of a certain value—these three ingredients make the crime. The intent and the act may be averred in the very words of the statute; did feloniously steal, take, and carry away. The subject of the act must be more specifically averred, because the words of the definition are generic, and the subject of the larceny is of a species. This is to be done to meet a requirement of the common law, and not of the statute; that the particular property taken shall be set forth by the name or description of its kind, for the full information of the accused; *Rex v. Chalkley* (Russ. &

Ry., 258) ; and to show that the chattel averred is the same as that proven.

Another section of the statute has enumerated the different species of that generic term :

"The term personal property, as used in this chapter, shall be construed to mean goods, chattels, effects, evidences of right in action, and all *written instruments by which any pecuniary obligation*, or any right or title to property, real or personal, *shall be created, acknowledged, transferred, increased, defeated, discharged or diminished.*" (2 R. S., p. 702, § 33.)

Now the indictment avers that the prisoner, "with force and arms, one draft," made and drawn by the savings bank on the bank in New York city, "feloniously did steal, take and carry away." It thus avers the intent and the act. It also describes the draft. It gives a full and precise copy of the words of it, and the words of the indorsements which were upon it, before and when it came to the hands of the prisoner, so that there can be no mistake that it is properly averred as a written instrument, by which a pecuniary obligation is created, acknowledged and transferred. Thus the averment shows that it is the personal property of the sixty-third section, by showing that it is one of the species of that term enumerated in the thirty-third section. It then avers that it was the personal property of another than the prisoner, naming in the count we now have under our eye, the State of New York as that other. It also avers that the draft was of the value of \$7,500. Thus is made a complete averment of the subject of the larceny.

1st. The kind of property.

2d. The other of whom it is the property ; and

3d. The value of the property, as over twenty-five dollars.

And thus is made a complete averment of all the constituents of the statutory crime of which the prisoner was found guilty.

There is another section of the statute which is applicable to the case :

"If the property stolen consists of any * * * draft, * * * the money due thereon, or secured thereby and remaining unsatisfied, or which in any contingency might

be collected thereon, * * * shall be deemed the value of the article so stolen." (2 R. S., § 66, *supra*.)

This section does not make any part of the description of the offence. It prescribes a rule of evidence, and furnishes a mode of proving the value of the draft stolen. It is evident that though all the other elements of the offence (the intent, the act, the kind of property, the owner,) may be susceptible of easy proof, there would be difficulty in proving that a piece of paper, with words written or printed upon it, was of the value of over twenty-five dollars. Such a piece of paper, a draft for over that amount, payable to order and not indorsed, would be valueless in the hands of a felonious taker of it, and valueless in any hands, merely as a piece of printed or written paper. Its value would be, in the evidence which the words of it gives, of an obligation to pay, and in the power which it gives to the payee to obtain the sum of money named in it. It has its worth from its relation to some other thing. (2 East P. C., 597.) So this section of the statute was needed and was adopted to make an arbitrary value to the draft, for the purposes of the criminal law, and to give a ready means of proof of that value. The offence is to steal such a paper over such a value. The fact that it is over such a value, and the proof of the averment of that fact, is in the other fact, that by force of the words of it, not yet put in use to realize upon it, there is money to more than that amount due thereon or secured thereby and remaining unsatisfied.

Now the test is this: Would not the sixty-third and thirty-third sections, above cited, if standing alone, with no aid or accompaniment from the sixty-sixth section, above cited, have created a statutory offence? They set forth all the elements of an offence. It would have been difficult to have made proof of value, so as to bring the case up to the minimum of twenty-five dollars fixed by the statute; but that would have been a failure of proof, not a failure of the law as not declaring the offence. The very reason of the passage of the statute, making choses in action the subject of larceny, was the rule of the common law, that their whole inherent value being the price of the paper, it was too insignificant to be worthy of punishment. (4 Bl. Comm., 234; 2 East P. C., *supra*.) Our statute has arbitrarily made them

the subject of the grand larceny, if the value be over twenty-five dollars; and mindful of this rule of the common law, the statute has declared that the gauge of value shall not be the worth or the price of the paper on which they are written, but the power which the writing on them has to obtain money. So it is apparent that the two sections first named create and declare an offence. The rule of the common law above named does not avail against it; because the law-making power has said (taking those two sections alone), notwithstanding that rule, stealing a chose in action will be grand larceny hereafter, if the proof can be made of value to the amount fixed; and then, seeing how great the difficulty would be of making that proof, it has further said, we also give you this new rule of value for this case. But it no more made the means by proof of showing the value, a part of the offence, than the common law did when it declared the stealing of a horse or other chattel to be grand larceny. There was the same rule in effect as to chattels, as there was to choses in action; if valueless, the law did not deem it an offence to take them; so it was and is a rule that value must be averred and shown. (*Phipoe's Case*, 2 Leach Cr. L., 774; *Starkie Cr. Pl.*, 450; but see *Reg. v. Morris*, 9 C. & P., 349.) But the reasons why there is value to them — that is, the elements which enter into the mind of the witness in making up his judgment and testifying as to their worth, are not a part of the offence requiring an averment of them in the indictment.

It is true that the precedents of indictments in the text books of English writers furnish an averment, of the kind claimed by the prisoner to have been faultily omitted from the indictment on which he was tried; and the rulings of English courts hold, that, without such an averment, an indictment for the larceny of a draft, or the like written instrument, is faulty. The reason for that is that the English statute (2 George II) blends in one section, the matter distributed in three sections in our Revised Statutes; and so blends it as to make it all part of the description of the offence. So it was with the Statute of South Carolina, interpreted in *The State v. Thomas* (2 McCord, 527), cited for the plaintiff in error. The language there is, that the stealing any instrument for the payment of money, shall be

deemed felony of the same nature as it would have been, if the offender had stolen goods of like value with the money due and remaining unsatisfied on that instrument.

It is apparent that no information is given of the grade of the offence until statement made of the amount thus due and unsatisfied. So that, if the indicted person should plead guilty to an indictment which lacked the averment of the amount due and unsatisfied, the court would have no hint from it of the grade of the offence, nor of the punishment to be inflicted. On the contrary, our statute does fix the grade of the offence. An indictment, in the language of sections sixty-six and thirty-three, gives information of what offence is charged. And so it is in England, when the statute is like ours. Thus, in *Rex v. Johnson* (3 Maule & Selw., 539), the indictment charged the prisoner with stealing nine bank notes for the payment of divers sums of money, amounting in the whole to a certain sum of money, to wit, the sum of nine pounds of lawful money, and of the value of nine pounds. Lord ELLENBOROUGH, C. J., said: "If bank notes be recognized by that description in an act of Parliament, the indictment has done enough in laying them under such a description;" and LE BLANC, J., said: "Where a specific thing is made the subject of larceny, it is only necessary to describe it as such specific thing, it being a species of thing which is the subject of larceny. It may be said of a bank-note, it is not necessary to describe it particularly as a bank-note for the payment of one pound, five pounds or twenty pounds; because, for whatsoever sum it may be payable, it is still a bank-note. The argument on this part of the case has arisen from the practice of describing the particular sum for which the note is payable, and that *the money secured thereby is unsatisfied*. The answer is, that whether it be payable for one sum or another, it is equally a bank note, and a bank note is the subject of larceny. No further description is necessary, than for other chattels which are the subject of larceny, and under the general name of bank note, the particular species, if the sum for which the note is payable may be said to constitute a species, may be proved." And see *Milnes' Case* (2 East Cr. L., 602), where an indictment, charging the stealing of "a promissory note for one guinea," was held good.

It is well to observe of the case *Halbrook v. The People* (13 J. R., *93), cited for plaintiff in error, that no such point as his was there decided or raised, though the indictment was such as might have elicited it. Nor does that case or *The People v. Loomis* (4 Denio, 380), liken our Revised Statutes to 2 Geo. II, *supra*, as is erroneously supposed. It is 1 R. L., 174, which is said to have a likeness. The latter holds only that there must be some value to the chose in action, and that some value must be proven.

In *Stewart v. Comm.* (4 Sergt. & R., 194), the point was not made by counsel, and it was enough for the case to have said that the notes should have been more particularly described. The case was not elaborately considered, and is not in accord with an intimation of TILGHMAN, C. J., in 3 Binney, 533.

Nor is there in our views here expressed any departure from *Wood v. The People* (53 N. Y., 511), where it is said that the indictment must aver all the things that make the offence. The reason of that rule is to inform the accused of the leading grounds of the charge; to enable the court to pronounce the proper judgment affixed by law to the combination of facts alleged (2 McCord, *supra*); and to enable the party to plead the judgment in bar of a second prosecution. (3 Greenl. on Ev., § 10.)

We conclude that the indictment did make sufficient averment of the subject of the larceny, and that this point is not well taken.

The next point for our consideration is this: That to constitute a good indictment for larceny, it is absolutely necessary that the name of the true owner of the thing stolen, if known, should be stated. It is claimed that neither the State of New York, nor Thomas Raines, nor Nelson K. Hopkins, nor Raines as State Treasurer, nor Hopkins as Comptroller, had any general or special property in the draft, and that it was manifestly improper to aver it to be the property of a person or persons unknown.

It is clear that it was of no avail in this case to allege that the draft was the property of a person or persons to the jurors unknown. The grand jury had all the information of ownership which was needed to determine in whom was the ownership. As to that part of his claim, we are with

the plaintiff in error ; but we do not agree with the rest of it. It is claimed that the State of New York had no ownership of this draft, though it was sent by the proper official of Niagara county for the proper purpose of paying the tax indebtedness of that county to the State. And the reason given is, that the statute law does not provide for the payment of that indebtedness in the mode taken by that official ; and more than that, that payment is by statute prohibited in other than one way. Reliance is had to sustain this contention upon chapter 427 of Laws of 1855, p. 781, title 1, § 3. That section begins with this language: "*Such* payment may *also* be made by depositing *such* money," etc., etc., and then goes on to provide *a way* in which county treasurers may make payment of the State tax. It is plain that this is not the sole way which the law will recognize. The first phrase "*such* payment" refers to something which has gone before in the statute, and the phrase "*may also be made,*" indicates that another mode of payment has been before provided or indicated ; and we do find that the second section of the same title of that chapter says, that the "county treasurer shall, on or before the first day of March in each year, pay to the treasurer of the State the amount of the State tax." * * * This is a general direction or command, requiring payment, without specifying the mode, and being satisfied by any mode which brings the money for the State tax to the official custody of the State treasurer. The duty put upon the county treasurer by this second section is to pay to the State Treasurer. If he takes the method of the third section, he fulfils that duty. He no less fulfils it, if he comes in person and lays down before the State Treasurer, in his office, the amount of the State tax in coin ; and no less if he transmits by mail to that official such draft or bill of exchange, as the State Treasurer is willing to use, to procure the money upon, and does procure the money upon it ; and no less if he transmits that draft to a private person, or to an official person, to be handed over to the State Treasurer, and the latter procures the money upon it ; or follows any other way of putting into the coffers of the State the money which is due it, which way has been sanctioned by the practice of the official agents of the State connected with its treasury and financial affairs ; provided, that

thereby the money gets into the State treasury. There is no prohibition by law, or any way of making payment. So that payment is made, any way of paying is lawful. Doubtless, as is contended for the plaintiff in error, the bringing into the office of the Comptroller or the State Treasurer a draft, did not pay any portion of the State tax, but it was a step in a process of paying which had been recognized and sanctioned by official usage, as is plainly inferable from the evidence, and which would be complete when the State Treasurer had realized upon a draft transmitted. The State is not bound, if the draft proves worthless, without neglect of its agents; nor do we say that it is bound, if that neglect makes the draft worthless; nor is it necessary that it be held that the State acquired an absolute property in the draft. Whatever right its public agents acquired in it, they acquired for it. If that was a special and limited interest in it, still it was such an interest as that it made a proper averment to allege that the State was the owner.

It is not necessary that the indictment should name that person as owner, and him only, who has the general ownership of the property, a title absolute, which he can maintain against the whole world. It is enough, if any one be named who has a special property in the thing stolen. A special property is a qualified or limited right, such as a bailee of it has; and a bailee of property is one to whom the thing has been delivered, to be held according to the purpose or object of the delivery, and to be returned to the bailor, or delivered over to some other, when that object has been accomplished, or for the purpose of accomplishing it; and the obligation of the bailee may arise by implied contract, as well as express agreement. Thus a finder of a lost chattel or chose in action, may become a bailee of it by the act of finding and keeping it in custody. And so, too, is the recipient of a chattel or chose in action, either directly from the hands of the absolute owner, or through the intervention of a private agency such as a manager, or a public agency such as a common carrier or the government mails. Hence this character of bailee, with this special property in the thing, may arise, without any express agreement to receive and to hold for a particular purpose. It may arise from the bare fact of the thing coming into the actual pos-

session and control of a person fortuitously, or by mistake as to the duty or ability of the recipient to effect the purpose contemplated by the absolute owner; and I see no reason why a person who is the incumbent of a public office, may not become in his official capacity, such bailee, and may not properly deliver the thing in his possession to his successor in office, charged with that continuing duty as to it which will confer on him a special interest in it. For instance, suppose that in the course of interchange of printed public statutes and other books between the States, a package from Maine, meant for the State library of this State, or for another State, addressed to the Secretary of State, should reach Albany at the close of the last day of his term of office, and should be left at his official rooms in the State hall from the express company's delivery wagon; can it be said that he is not under a duty to the real owner, whoever it may be, to care for it through the day, and that his successor would not, on the next day, receiving it with the other property in those rooms, be subject to the same duty? The duty thus put upon them in turn, would give them in turn a special right and ownership in the property, which could be defended against all but the absolute owner. The statute law might not impose upon the Secretary of State any duty to this State in relation to the parcel; but having, by reason of his official position, had it committed to him, he is subjected to a duty to use ordinary care in the preservation of it from loss or violence. If it be granted that he does not receive it in his official capacity, for the reason that the law does not make it a duty of his office so to do, let us then add to the facts supposed, that it has been the course of his office to take in such packages and deliver them to the proper department, or to return them if missent, does he not then owe a duty of ordinary care until one or the other of these objects has been reached? If it be said that, in addition to the absence of law imposing such official duty, it does not appear that, in fact, the package came to his hands or his notice, does not the fact that he has permitted deputies, clerks and servants, appointed or continued by him, and removable by him at his pleasure, to receive such packages and forward or return them in orderly course, put upon him as an individual the duty of ordinary care when

one comes to his office-rooms in the regular course of business. We think that there can be but an affirmative answer to these queries. And then it follows that there was in the public officers into whose possession this draft came by being put into the custody of one of their servants or clerks, for the purpose of being converted into money for deposit in the State treasury, a duty to the county of Niagara and to its treasurer, to see that that purpose was accomplished, or the draft sent back with notice that that mode of receiving payment of State taxes would no longer be kept up. We say nothing, and have no opinion, nor intimate any, whether there has been any failure in the performance of that duty, or whether, if there has, it be excusable or not in law. There being a duty, there was a special property in the draft, accompanying that duty, so that there was a proper averment in some count of the indictment of an owner of the property. The special interest acquired by the public agents of the State was the interest of the State; for the retiring Secretary of State, in the case supposed, could not properly take away with him the package of books. It must be left for his successor to take, by virtue of his office; and as he takes it by virtue of his office, he takes it as the agent of the State; and hence the State obtains and retains the special interest in the property which will sustain an averment of ownership. (*See People v. Bennett*, 37 N. Y., 117.)

The next two points are akin. They both turn upon the question of whether there was an actual or constructive possession of the draft in the alleged owner, the State of New York, at the time of the taking by the plaintiff in error.

It is held in *McDonald v. The People* (43 N. Y., 61), that if money or property is delivered by the owner to a person for mere custody or charge, or for some specific purpose, the legal possession remains in the owner, and a criminal conversion of it by the custodian is larceny. It is clear that the plaintiff in error had the draft, for the special purpose of making the proper entries on account of it in the books of the State Treasurer, and of putting it into the State deposit bank later in the day, and that all the interest he had in it until that special purpose could be accomplished was the mere charge or custody of it. He had no more than

this, for that purpose could be changed by the State Treasurer, and that custody interrupted at any moment.

But it is urged that the draft came lawfully into the possession of the plaintiff in error, and that he acquired that possession before he formed the purpose of appropriating it to himself.

It is doubtless a general rule that every larcenous taking must be such as that trespass would lie therefor. Then another is, that trespass will not lie, unless the owner of the property is in the actual or constructive possession at the time of the taking. Then another, that such possession must have existed apart from the charge of the property by the custodian; and that neither the civil nor the criminal action will lie, when such possession has been had only through his custody of it. But there have been some modifications of these rules. One is, that larceny may be charged, in such case, when the felonious appropriation is after the property reaches its ultimate destination. It is doubtful whether this rule applies to this case, for the ultimate destination of the draft may have been the State deposit bank. If the ultimate destination could with certainty be said to be the safe of the State Treasurer, then it would be applicable. But, ordinarily, property cannot be said to have reached its ultimate destination while it remains in the personal custody of the servant, especially if there is another assigned place of deposit than the hands of the servant. There is another rule which does apply — where the property is received by the servant or custodian from another, who occupies the relation of agent for the owner, or who stands in the position of the owner in respect to the possession; then, though the owner never had the actual possession, yet the possession of such other person is his possession. These rules and the modifications of them were asserted by this court in *McDonald v. The People* (*supra*), in an opinion delivered by the Chief Judge. To that case reference is now had for the discussion of them.

Now, in the case in hand, the draft came into the State hall, and went first to the actual possession of Mr. Gallien, the Second Deputy Comptroller. Thus, it came into the actual possession of a sub-servant of the State, whose actual possession was the possession of the State, who thereby

became the special owner of it. If it was sent by a messenger to Phelps, as the jury might have found that it was, that messenger had actual possession of it. He was another sub-servant of the State, which had already acquired a special interest in it. Thus, the actual possession of the messenger was the possession of the State. The State never had, and never could have, the manual possession of it; but it could and did have a constructive possession, and the delivery of the draft into the custody of the plaintiff in error for a special purpose, was a delivery by the State to him for that purpose. Thus, he had only the custody or charge of the draft. (*The People v. Bennett, supra*; *W. S. v. Hutchinson*, 7 Penn. Law Jour., 365.) And if the taking of it by him from the messenger was not a trespass, the carrying it away, having only the bare custody of it, was; and if that carrying of it away was with felonious intent, as the jury have found that it was, it was larceny. The authorities are cited in the case in this court (43 N. Y., *supra*), and the phraseology of this discussion is taken almost bodily therefrom.

When the owner has parted with the custody only of the property, and not with the possession, and the servant converts the chattel to his own use, it is larceny, though he had no felonious intent when he received it into his custody (2 Russ. on Cr., 158); which rule was applied in *Comm. v. Hutchinson* (2 Parsons' Selected Cases, 384); *People v. Call* (1 Denio, 120).

There are several other points upon the printed brief handed up for the plaintiff in error. Some of the views contained in them have been met in the foregoing discussion. As the points which chiefly attracted our attention, and seemed to have most weight, have been already treated at length, it will suffice to notice others briefly.

1st. The draft was a legal, operative instrument, when it reached the hand of Phelps. The original payee had indorsed it to Mr. Hopkins, as Comptroller. This gave him the right to transfer it by indorsement. He had continued Mr. Gallien in office as Second Deputy Comptroller, upon the original appointment of Mr. Comptroller Allen, and had sanctioned his indorsement over of this kind of drafts to the State Treasurer. The office of Second Deputy Comptroller

was a lawful office, and Gallien a lawful incumbent of it (2 vol. Laws of 1866, p. 1608), and with power to perform any duty put upon him by the Comptroller (1 R. S. 117, § 7), and authorized to act in the capacity of the deputy. (See, also, Laws 1873, p. 1003; 1874, p. 500.) The question of whether the State would be bound, as if an indorser, by the indorsement of its officers, does not enter into this case. If the indorsements transferred the power to use the draft to obtain the money called for by it, that made it operative. In the hands of the State Treasurer there would have been that power, and it was his duty to use it to get the money for the use of the State, or to re-indorse it for return to the county treasurer; and there can be no question but that he could have been compelled to do the latter, had he declined to do the former.

2d. We think that the testimony of the conversation with Phelps at Jersey City was properly received. Though it did not particularize this draft, it did show circumstances which might, by inference, include or refer to this. (*Weed v. People*, 56 N. Y., 628.)

3d. The challenge to the juror Lamb was properly overruled. Though some of his answers taken separately would perhaps have established a disqualification, yet the effect of all that he said was to show him a proper juror, under the late statutes. (1872, p. 1133; 1873, p. 681.)

4th. The distinction attempted to be made between descriptions or names, "The State of New York," and "The People of the State of New York," that a different thing or body is indicated by the use of one rather than the other, cannot be sustained. There are instances where the latter cognomen must be used, as in the enacting clause of bills, though this is probably more for the sake of uniformity than as matter of materiality. But, in the absence of positive requirement, the one appellation as well as the other designates completely the thing meant, the sovereignty whose rights have been affected. The plaintiff in error cites many instances of constitutional and statutory expression where the phrase "The People of the State," or "The People of the State of New York" is preferred. There are others where the other designation is used. (2 R. S., 703, §§ 35-36; 1 id., 165, § 15; 65, § 3; 172, §§ 13-17; 179, 181, §§ 1-

17.) The first citation of those just made, is of the statute which defines "*person*," as used to designate the party whose property may be the subject of any offence, and in it, it is said that the terms shall include "*this State*." Another statute indicates that all civil actions will be brought in the name of the People of this State. (2 R. S., 552, § 13.) Neither, in our judgment, was meant to declare a difference in ultimate material signification from "the State of New York;" but only to prescribe a rule to save doubt. And the rule invoked by the plaintiff in error, that the ownership must be laid in some person or body who could maintain the civil action of trespass for the recovery of the property, must be considered in this case, in view of the operation of the above statute, which defines the word "*person*," and as modified thereby.

The numerous requests to charge have been considered. The propositions embodied in them, or most of them, have been expressly or inferentially discussed in what has already been said. As to the rest, we are of the opinion that no error was committed in the refusals, connected, as they were, in the utterances of the court, with the charge which was given to the jury.

The case was well tried at Oyer and Terminer, and has been ably and thoroughly presented to this court. The exhaustive briefs of the respected counsel, touching the case at all points, have very much assisted the labor of the court.

The consideration we have given it, has brought us to the conclusion that the plaintiff in error was legally indicted and convicted, and is justly undergoing the punishment for his unlawful act.

The case of the Oneida county draft is still stronger than the foregoing, from the additional fact that the written instrument in that case passed to Phelps from the hand of Milks, another servant of the State, and also a servant of the State Treasurer, and who held it for the State Treasurer, as well as for the State, before it was delivered into the custody of Phelps.

All concur.

Judgment affirmed.

SUPREME COURT OF THE UNITED STATES.

1875.

UNITED STATES V. CRUIKSHANK ET AL.

The defendants were tried in the Circuit Court of the United States for the District of Louisiana, on an indictment for conspiracy under the sixth section of the act of May 30, 1870, known as the Enforcement act. The indictment contained thirty-two counts and three of the defendants were found guilty under the first sixteen counts, and not guilty under the remaining counts. The general charge in the first eight counts is that of "banding," and in the second eight, that of "conspiring" together to injure, oppress, threaten, and intimidate Levi Nelson and Alexander Tillman, citizens of the United States, of African descent and persons of color, with the intent thereby to hinder and prevent them in their free exercise and enjoyment of rights and privileges "granted and secured" to them "in common with all other good citizens of the United States by the constitution and laws of the United States."

The parties convicted moved in arrest of judgment on the following grounds :

1. Because the matters and things set forth and charged in the several counts, one to sixteen inclusive, do not constitute offences against the laws of the United States, and do not come within the purview, true intent, and meaning of the act of Congress, approved 31st of May, 1870, entitled "*An Act to enforce the rights of citizens of the United States,*" &c.
 2. Because, &c. &c., do not constitute offences cognizable in the Circuit Court, and do not come within its powers and jurisdiction.
 3. Because the offences created by the sixth section of the act of Congress referred to, and upon which section the aforesaid sixteen counts are based, are not constitutionally within the jurisdiction of the courts of the United States, and because the matters and things therein referred to are judicially cognizable by State tribunals only, and legislative action thereon is among the constitutional reserved rights of the several States.
 4. Because the said act, in so far as it creates offences and impose penalties, is in violation of the Constitution of the United States, and an infringement of the rights of the several States and the people.
 5. Because the eighth and sixteenth counts of the indictment are too vague, general, insufficient, and uncertain, to afford the accused proper notice to plead and prepare their defence, and set forth no specific offence under the law.
 6. Because the verdict of the jury against the defendants is not warranted or supported by law.
- On this motion the opinion of the judges were divided, and at the instance of the United States the case comes up on the certificate of this division of opinion. The certificate states the question to be, whether "the said sixteen counts of said indictment are severally good and sufficient in law, and contain charges of criminal matter indictable under the laws of the United States."

This certificate presents the question whether this indictment, based upon section 6 of the Enforcement Act of May 31, 1870, is sufficient in law and contains charges of criminal matter indictable under the laws of the United States.

Section six reads as follows : — "That if two or more persons shall band or conspire together, or go in disguise upon the public highway, or upon the premises of another, with an intent to violate any provision of this act, or to injure, oppress, threaten, or intimidate any citizen, with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the constitution or laws of the United States, or because of his having exercised the same, such persons shall be held guilty of felony, and, on conviction thereof, shall be fined or imprisoned, or both, at the discretion of the court, — the fine not to exceed \$5,000, and the imprisonment not to exceed ten years ; and shall, moreover, be thereafter ineligible to, and disabled from holding, any office or place of honor, profit, or trust created by the constitution or laws of the United States." 16 Stat. 141.

Held, that the general charge in the first eight counts is that of "banding," and in the second eight, that of "conspiring" together to injure, oppress, threaten, and intimidate Levi Nelson and Alexander Tillman, citizens of the United States, of African descent and persons of color, with the intent thereby to hinder and prevent them in their free exercise and enjoyment of rights and privileges "granted and secured" to them "in common with all other good citizens of the United States by the constitution and laws of the United States."

Held, that the offences provided for by the statute in question do not consist in the mere "banding" or "conspiring" of two or more persons together, but in their banding or conspiring with the intent, or for any of the purposes specified. To bring this case under the operation of the statute, therefore, it must appear that the right, the enjoyment of which the conspirators intended to hinder or prevent, was one granted or secured by the constitution or laws of the United States. If it does not so appear, the criminal matter charged has not been made indictable by any act of Congress.

Held, that the government of the United States is one of delegated powers alone. Its authority is defined and limited by the Constitution. All powers not granted to it by that instrument are reserved to the States or the people. No rights can be acquired under the constitution or laws of the United States, except such as the government of the United States has the authority to grant or secure. All that cannot be so granted or secured are left under the protection of the States.

Held, that the first and ninth counts of the indictment state the intent of the defendants to have been to hinder and prevent the citizens named, in the free exercise and enjoyment of their "lawful right and privilege to peaceably assemble with each other and with other citizens of the United States for a peaceful and lawful purpose." The right of the people peaceably to assemble for lawful purposes existed long before the adoption of the Constitution of the United States. In fact, it is, and always has been, one of the attributes of citizenship under a free government. It "derives its source from those laws whose authority is acknowledged by civilized man throughout the world." It is found wherever civilization exists. It is not, therefore, a

right granted to the people by the Constitution. The government of the United States when established found it in existence, with the obligation on the part of the States to afford it protection. As no direct power over it was granted to Congress, it remains subject to State jurisdiction.

Held, that the particular amendment of the Constitution now under consideration assumes the existence of the right of the people to assemble for lawful purposes, and protects it against encroachment by Congress. The right was not created by the amendment; neither was its continuance guaranteed, except as against congressional interference. For their protection in its enjoyment, therefore, the people must look to the States. The power for that purpose was originally placed there, and it has never been surrendered to the United States.

Held, that if it had been alleged in these counts, that the object of the defendants was to prevent a meeting for such a purpose, the case would have been within the statute, and within the scope of the sovereignty of the United States. Such, however, is not the case. The offence, as stated in the indictment, will be made out, if it be shown that the object of the conspiracy was to prevent a meeting for any lawful purpose whatever.

Held, that the second and tenth counts are equally defective. The right there specified is that of "bearing arms for a lawful purpose." This is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The second amendment declares that it shall not be infringed; but this, as has been seen, means no more than that it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the national government, leaving the people to look for their protection against any violation by their fellow citizens of the rights it recognizes, to what is called the "powers which relate to merely municipal legislation, or what was, perhaps, more properly called, internal police," "not surrendered or restrained" by the Constitution of the United States.

Held, that the third and eleventh counts are even more objectionable. They charge the intent to have been to deprive the citizens named, they being in Louisiana, "of their respective several lives and liberty of person without due process of law." This is nothing else than alleging a conspiracy to falsely imprison or murder citizens of the United States, being within the territorial jurisdiction of the State of Louisiana. The rights of life and personal liberty are natural rights of man. "To secure these rights," says the Declaration of Independence, "governments are instituted among men, deriving their just powers from the consent of the governed." The very highest duty of the States, when they entered into the Union under the Constitution, was to protect all persons within their boundaries in the enjoyment of these "unalienable rights with which they were endowed by their Creator." Sovereignty, for this purpose, rests alone with the States. It is no more the duty or within the power of the United States to punish for a conspiracy to falsely imprison or murder within a State, than it would be to punish for false imprisonment or murder itself. The fourteenth amendment prohibits a State from depriving any person of life, liberty, or property, without due process of law; but this adds nothing to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the States upon the fundamental rights which

belong to every citizen as a member of society. It secures "the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice." These counts in the indictment do not call for the exercise of any of the powers conferred by this provision in the amendment.

Held, that the fourth and twelfth counts charge the intent to have been to prevent and hinder the citizens named, who were of African descent and persons of color, in "the free exercise and enjoyment of their several right and privilege to the full and equal benefit of all laws and proceedings, then and there, before that time, enacted or ordained by the said State of Louisiana and by the United States; and then and there, at that time, being in force in the said State and District of Louisiana aforesaid, for the security of their respective persons and property, then and there, at that time enjoyed at and within said State and District of Louisiana by white persons, being citizens, of said State of Louisiana and the United States, for the protection of the persons and property of said white citizens." There is no allegation that this was done because of the race or color of the persons conspired against. The case as presented amounts to nothing more than that the defendants conspired to prevent certain citizens of the United States, being within the State of Louisiana, from enjoying the equal protection of the laws of the State and of the United States.

Held, that the fourteenth amendment prohibits a State from denying to any person within its jurisdiction the equal protection of the laws; but this provision does not, any more than the one which precedes it, add anything to the rights which one citizen has under the Constitution against another. The duty of protecting the equality of the rights of citizens was originally assumed by the States; and it still remains there. The only obligation resting upon the United States is to see that the States do not deny the right. This the amendment guarantees, but no more.

Held, that the sixth and fourteenth counts state the intent of the defendants to have been to hinder and prevent the citizens named, being of African descent, and colored, "in the free exercise and enjoyment of their several and respective right and privilege to vote at any election to be thereafter by law had and held by the people in and of the said State of Louisiana, or by the people of and in the parish of Grant aforesaid." Inasmuch, therefore, as it does not appear in these counts that the intent of the defendants was to prevent these parties from exercising their right to vote on their race, &c., it does not appear that it was their intent to interfere with any right granted or secured by the constitution or laws of the United States. One may suspect that race was the cause of the hostility; but it is not so averred. This is material to a description of the substance of the offence, and cannot be supplied by implication. Every thing essential must be charged positively, and not inferentially. The defect here is not in form, but in substance.

Held, that the seventh and fifteenth counts are no better than the sixth and fourteenth. The intent charged is to put the parties named in great fear of bodily harm, and to injure and oppress them, because, being and having been in all things qualified, they had voted "at an election before that time had and held according to law by the people of the said State of Louisiana, in said State, to wit, on the fourth day of November, A.D. 1872, and at divers other elections by the people of the State, also before that time had and

held according to law." There is nothing to show that the elections voted at were any other than State elections, or that the conspiracy was formed on account of the race of the parties against whom the conspirators were to act. The charge as made is really nothing more than a conspiracy to commit a breach of the peace within a State. Certainly it will not be claimed that the United States have the power or are required to do mere police duty in the States. If a State cannot protect itself against domestic violence, the United States may, upon the call of the executive, where the legislature cannot be convened, lend their assistance for that purpose. This is a guaranty of the Constitution ; but it applies to no case like this.

Held, that the first, second, third, fourth, sixth, seventh, ninth, tenth, eleventh, twelfth, fourteenth, and fifteenth counts do not contain charges of a criminal nature made indictable under the laws of the United States, and are not good and sufficient in law. They do not show that it was the intent of the defendants, by their conspiracy, to hinder or prevent the enjoyment of any right granted or secured by the Constitution.

Held, that the intent charged in the fifth and thirteenth is "to hinder and prevent the parties in their respective free exercise and enjoyment of the rights, privileges, immunities, and protection granted and secured to them respectively as citizens of the United States, and as citizens of said State of Louisiana," "for the reason that they, * * * being then and there citizens of said State and of the United States, were persons of African descent and race, and persons of color, and not white citizens thereof ;" and in the eighth and sixteenth, to hinder and prevent them "in their several and respective free exercise and enjoyment of every, each, all, and singular the several rights and privileges granted and secured to them by the constitution and laws of the United States." The same general statement of the rights to be interfered with is found in the fifth and thirteenth counts.

Held, that the question here is whether the offence has here been described at all. These counts in the indictment charge, in substance, that the intent in this case was to hinder and prevent these citizens in the free exercise and enjoyment of "every, each, all, and singular" the rights granted them by the Constitution, &c. There is no specification of any particular right.

Held, that in criminal cases, prosecuted under the laws of the United States, the accused has the constitutional right "to be informed of the nature and cause of the accusation." The indictment must set forth the offence "with clearness and all necessary certainty, to apprise the accused of the crime with which he stands charged, and every ingredient of which the offence is composed, must be accurately and clearly alleged. It is an elementary principle of criminal pleading, that where the definition of an offence, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offence in the same generic terms as in the definition ; but it must state the species,—it must amount to particulars. A crime is made up of acts and intent ; and these must be set forth in the indictment, with reasonable particularity of time, place, and circumstances. The indictment should state the particulars, to inform the court as well as the accused.

Held, that these counts are too vague and general. They lack the certainty and precision required by the established rules of pleading, and they are not good and sufficient in law.

Mr. Attorney-General Williams and Mr. Solicitor-General Phillips, for the United States.

Mr. Reverdy Johnson, Mr. David Dudley Field, Mr. Philip Phillips, and Mr. R. H. Marr, for the accused.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.

This case comes here with a certificate by the judges of the Circuit Court for the District of Louisiana that they were divided in opinion upon a question which occurred at the hearing. It presents for our consideration an indictment containing sixteen counts, divided into two series of eight counts each, based upon sect. 6 of the Enforcement Act of May 31, 1870. That section is as follows:—

“That if two or more persons shall band or conspire together, to go in disguise upon the public highway, or upon the premises of another, with intent to violate any provision of this act, or to injure, oppress, threaten, or intimidate any citizen, with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the constitution or laws of the United States, or because of his having exercised the same, such person shall be held guilty of felony, and, on conviction thereof, shall be fined or imprisoned, or both, at the discretion of the court, — the fine not to exceed \$5,000, and the imprisonment not to exceed ten years; and shall, moreover, be thereafter ineligible to, and disabled from holding, any office or place of honor, profit, or trust created by the constitution or laws of the United States.” 16 Stat. 141.

The question certified arose upon a motion in arrest of judgment after a verdict of guilty generally upon the whole sixteen counts, and is stated to be, whether “the said sixteen counts of said indictment are severally good and sufficient in law, and contain charges of criminal matter indictable under the laws of the United States.”

The general charge in the first eight counts is that of “banding,” and in the second eight, that of “conspiring” together to injure, oppress, threaten, and intimidate Levi Nelson and Alexander Tillman, citizens of the United States, of African descent and persons of color, with intent thereby

to hinder and prevent them in their free exercise and enjoyment of rights and privileges "granted and secured" to them "in common with all other good citizens of the United States by the constitution and laws of the United States."

The offences provided for by the statute in question do not consist in the mere "banding" or "conspiring" of two or more persons together, but in their banding or conspiring with the intent, or for any of the purposes, specified. To bring this case under the operation of the statute, therefore, it must appear that the right, the enjoyment of which the conspirators intended to hinder or prevent, was one granted or secured by the constitution or laws of the United States. If it does not so appear, the criminal matter charged has not been made indictable by any act of Congress.

We have in our political system a government of the United States and a government of each of the several States. Each of these governments is distinct from the others, and each has citizens of its own who owe it allegiance, and whose rights, within its jurisdiction, it must protect. The same person may be at the same time a citizen of the United States and a citizen of a State, but his rights of citizenship under one of these governments will be different from those he has under the other. *Slaughter-House Cases*, 16 Wall., 74.

Citizens are the members of the political community to which they belong. They are the people who compose the community, and who, in their associated capacity, have established or submitted themselves to the dominion of a government for the promotion of their general welfare and the protection of their individual as well as their collective rights. In the formation of a government, the people may confer upon it such powers as they choose. The government, when so formed, may, and when called upon should, exercise all the powers it has for the protection of the rights of its citizens and the people within its jurisdiction; but it can exercise no other. The duty of a government to afford protection is limited always by the power it possesses for that purpose.

Experience made the fact known to the people of the United States that they required a national government for national purposes. The separate governments of the separate States, bound together by the articles of confederation

alone, were not sufficient for the promotion of the general welfare of the people in respect to foreign nations, or for their complete protection as citizens of the confederate States. For this reason, the people of the United States, "in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty" to themselves and their posterity (Const. Preamble), ordained and established the government of the United States, and defined its powers by a constitution, which they adopted as its fundamental law, and made its rule of action.

The government thus established and defined is to some extent a government of the States in their political capacity. It is also, for certain purposes, a government of the people. Its powers are limited in number, but not in degree. Within the scope of its powers, as enumerated and defined, it is supreme and above the States; and beyond, it has no existence. It was erected for special purposes, and endowed with all the powers necessary for its own preservation and the accomplishment of the end its people had in view. It can neither grant nor secure to its citizens any right or privilege not expressly or by implication placed under its jurisdiction.

The people of the United States resident within any State are subject to two governments: one State, and the other National; but there need be no conflict between the two. The powers which one possesses, the other does not. They are established for different purposes, and have separate jurisdictions. Together they make one whole, and furnish the people of the United States with a complete government, ample for the protection of all their rights at home and abroad. True, it may sometimes happen that a person is amenable to both jurisdictions for one and the same act. Thus, if a marshal of the United States is unlawfully resisted while executing the process of the courts within a State, and the resistance is accompanied by an assault on the officer, the sovereignty of the United States is violated by the resistance, and that of the State by the breach of peace, in the assault. So, too, if one passes counterfeited coin of the United States within a State, it may be an offence against the United States and the State: The United States, because it

discredits the coin ; and the State, because of the fraud upon him to whom it is passed. This does not, however, necessarily imply that the two governments possess powers in common or bring them into conflict with each other. It is the natural consequence of a citizenship which owes allegiance to two sovereignties and claims protection from both. The citizen cannot complain, because he has voluntarily submitted himself to such a form of government. He owes allegiance to the two departments, so to speak, and within their respective spheres must pay the penalties which each exacts for disobedience to its laws. In return, he can demand protection from each within its own jurisdiction.

The government of the United States is one of delegated powers alone. Its authority is defined and limited by the Constitution. All powers not granted to it by that instrument are reserved to the States or the people. No rights can be acquired under the constitution or laws of the United States, except such as the government of the United States has the authority to grant or secure. All that cannot be so granted or secured are left under the protection of the States.

We now proceed to an examination of the indictment, to ascertain whether the several rights, which it is alleged the defendants intended to interfere with, are such as had been in law and in fact granted or secured by the constitution or laws of the United States.

The first and ninth counts state the intent of the defendants to have been to hinder and prevent the citizens named, in the free exercise and enjoyment of their "lawful right and privilege to peaceably assemble together with each other and with other citizens of the United States for a peaceful and lawful purpose." The right of the people peaceably to assemble for lawful purposes existed long before the adoption of the Constitution of the United States. In fact, it is, and always has been, one of the attributes of citizenship under a free government. It "derives its source," to use the language of Chief Justice Marshall, in *Gibbons v. Ogden*, 9 Wheat. 211, "from those laws whose authority is acknowledged by civilized man throughout the world." It is found wherever civilization exists. It was not, therefore, a right granted to the people by the Constitution. The government of the United States when estab-

lished found it in existence, with the obligation on the part of the States to afford it protection. As no direct power over it was granted to Congress, it remains, according to the ruling in *Gibbons v. Ogden*, id. 203, subject to State jurisdiction. Only such existing rights were committed by the people to the protection of Congress as came within the general scope of the authority granted to the national government.

The first amendment to the Constitution prohibits Congress from abridging "the right of the people to assemble and to petition the government for a redress of grievances." This, like the other amendments proposed and adopted at the same time, was not intended to limit the powers of the State government in respect to their own citizens, but to operate upon the National government alone. *Barron v. The City of Baltimore*, 7 Pet. 250; *Lessee of Livingston v. Moore*, id. 551; *Fox v. Ohio*, 5 How. 434; *Smith v. Maryland*, 18 id. 76; *Withers v. Buckley*, 20 id. 90; *Pervear v. The Commonwealth*, 5 Wall. 479; *Twitchell v. The Commonwealth*, 7 id. 321; *Edwards v. Elliott*, 21 id. 557. It is now too late to question the correctness of this construction. As was said by the late Chief Justice, in *Twitchell v. The Commonwealth*, 7 Wall. 325, "the scope and application of these amendments are no longer subjects of discussion here." They left the authority of the States just where they found it, and added nothing to the already existing powers of the United States.

The particular amendment now under consideration assumes the existence of the right of the people to assemble for lawful purposes, and protects it against encroachment by Congress. The right was not created by the amendment; neither was its continuance guaranteed, except as against congressional interference. For their protection in its enjoyment, therefore, the people must look to the States. The power for that purpose was originally placed there, and it has never been surrendered to the United States.

The right of the people peaceably to assemble for the purpose of petitioning Congress for a redress of grievances, or for anything else connected with the powers or the duties of the national government, is an attribute of national citizenship, and, as such, under the protection of, and guaran-

teed by, the United States. The very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances. If it had been alleged in these counts that the object of the defendants was to prevent a meeting for such a purpose, the case would have been within the statute, and within the scope of the sovereignty of the United States. Such, however, is not the case. The offence, as stated in the indictment, will be made out, if it be shown that the object of the conspiracy was to prevent a meeting for any lawful purpose whatever.

The second and tenth counts are equally defective. The right there specified is that of "bearing arms for a lawful purpose." This is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The second amendment declares that it shall not be infringed; but this, as has been seen, means no more than that it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the national government, leaving the people to look for their protection against any violation by their fellow-citizens of the rights it recognizes, to what is called, in *The City of New York v. Miln*, 11 Pet. 109, the "powers which relate to merely municipal legislation, or what was, perhaps, more properly called internal police," "not surrendered or restrained" by the Constitution of the United States.

The third and eleventh counts are even more objectionable. They charge the intent to have been to deprive the citizens named, they being in Louisiana, "of their respective several lives and liberty of person without due process of law." This is nothing else than alleging a conspiracy to falsely imprison or murder citizens of the United States, being within the territorial jurisdiction of the State of Louisiana. The rights of life and personal liberty are natural rights of man. "To secure these rights," says the Declaration of Independence, "governments are instituted among men, deriving their just powers from the consent of the governed." The very highest duty of the States, when they entered into the Union under the Constitution, was to protect all persons within their boundaries in the enjoyment of these

“unalienable rights with which they were endowed by their Creator.” Sovereignty, for this purpose, rests alone with the States. It is no more the duty or within the power of the United States to punish for a conspiracy to falsely imprison or murder within a State, than it would be to punish for false imprisonment or murder itself.

The fourteenth amendment prohibits a State from depriving any person of life, liberty, or property, without due process of law; but this adds nothing to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the States upon the fundamental rights which belong to every citizen as a member of society. As was said by Mr. Justice Johnson, in *Bank of Columbia v. Okely*, 4 Wheat. 244, it secures “the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.” These counts in the indictment do not call for the exercise of any of the powers conferred by this provision in the amendment.

The fourth and twelfth counts charge the intent to have been to prevent and hinder the citizens named, who were of African descent and persons of color, in “the free exercise and enjoyment of their several right and privilege to the full and equal benefit of all laws and proceedings, then and there, before that time, enacted or ordained by the said State of Louisiana and by the United States; and then and there, at that time, being in force in the said State and District of Louisiana aforesaid, for the security of their respective persons and property, then and there, at that time enjoyed at and within said State and District of Louisiana by white persons, being citizens of said State of Louisiana and the United States, for the protection of the persons and property of said white citizens.” There is no allegation that this was done because of the race or color of the persons conspired against. When stripped of its verbiage, the case as presented amounts to nothing more than that the defendants conspired to prevent certain citizens of the United States, being within the State of Louisiana, from enjoying the equal protection of the laws of the State and of the United States.

The fourteenth amendment prohibits a State from deny-

ing to any person within its jurisdiction the equal protection of the laws; but this provision does not, any more than the one which precedes it, and which we have just considered, add anything to the rights which one citizen has under the Constitution against another. The equality of the rights of citizens is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power: That duty was originally assumed by the States; and it still remains there. The only obligation resting upon the United States is to see that the States do not deny the right. This the amendment guarantees, but no more. The power of the national government is limited to the enforcement of this guaranty.

No question arises under the Civil Rights Act of April 9, 1866 (14 Stat. 27), which is intended for the protection of citizens of the United States in the enjoyment of certain rights without discrimination on account of race, color, or previous condition of servitude, because, as has already been stated, it is nowhere alleged in these counts that the wrong contemplated against the rights of these citizens was on account of their race or color.

Another objection is made to these counts, that they are too vague and uncertain. This will be considered hereafter, in connection with the same objection to other counts.

The sixth and fourteenth counts state the intent of the defendants to have been to hinder and prevent the citizens named, being of African descent and colored, "in the free exercise and enjoyment of their several and respective right and privilege to vote at any election to be thereafter by law had and held by the people in and of the said State of Louisiana, and by the people of and in the parish of Grant aforesaid." In *Minor v. Happersett*, 21 Wall. 178, we decided that the Constitution of the United States has not conferred the right of suffrage upon any one, and that the United States have no voters of their own creation in the States. In *United States v. Reese et al.*, *supra*, p. 214, we held that the fifteenth amendment has invested the citizens of the United States with a new constitutional right, which is, exemption from discrimination in the exercise of the elective franchise on account of race, color,

or previous condition of servitude. From this it appears that the right of suffrage is not a necessary attribute of national citizenship; but that exemption from discrimination in the exercise of that right on account of race, &c., is. The right to vote in the States comes from the States; but the right of exemption from the prohibited discrimination comes from the United States. The first has not been granted or secured by the Constitution of the United States; but the last has been.

Inasmuch, therefore, as it does not appear in these counts that the intent of the defendants was to prevent these parties from exercising their right to vote on account of their race, &c., it does not appear that it was their intent to interfere with any right granted or secured by the constitution or laws of the United States. We may suspect that race was the cause of the hostility; but it is not so averred. This is material to a description of the substance of the offence, and cannot be supplied by implication. Everything essential must be charged positively, and not inferentially. The defect here is not in form, but in substance.

The seventh and fifteenth counts are no better than the sixth and fourteenth. The intent here charged is to put the parties named in great fear of bodily harm, and to injure and oppress them, because, being and having been in all things qualified, they had voted "at an election before that time had and held according to law by the people of the said State of Louisiana, in said State, to wit, on the fourth day of November, A.D. 1872, and at divers other elections by the people of the State, also before that time had and held according to law." There is nothing to show that the elections voted at were any other than State elections, or that the conspiracy was formed on account of the race of the parties against whom the conspirators were to act. The charge as made is really of nothing more than a conspiracy to commit a breach of the peace within a State. Certainly it will not be claimed that the United States have the power or are required to do mere police duty in the States. If a State cannot protect itself against domestic violence, the United States may, upon the call of the executive, when the legislature cannot be convened, lend their assistance for that

purpose. This is a guaranty of the Constitution (art. 4, sect. 4); but it applies to no case like this.

We are, therefore, of the opinion that the first, second, third, fourth, sixth, seventh, ninth, tenth, eleventh, twelfth, fourteenth, and fifteenth counts do not contain charges of a criminal nature made indictable under the laws of the United States, and that consequently they are not good and sufficient in law. They do not show that it was the intent of the defendants, by their conspiracy, to hinder or prevent the enjoyment of any right granted or secured by the Constitution.

We come now to consider the fifth and thirteenth and the eighth and sixteenth counts, which may be brought together for that purpose. The intent charged in the fifth and thirteenth is "to hinder and prevent the parties in their respective free exercise and enjoyment of the rights, privileges, immunities, and protection granted and secured to them respectively as citizens of the United States, and as citizens of said State of Louisiana," for the reason that they, * * * being then and there citizens of said State and of the United States, were persons of African descent and race, and persons of color, and not white citizens thereof;" and in the eighth and sixteenth, to hinder and prevent them "in their several and respective free exercise and enjoyment of every, each, all, and singular the several rights and privileges granted and secured to them by the constitution and laws of the United States." The same general statement of the rights to be interfered with is found in the fifth and thirteenth counts.

According to the view we take of these counts, the question is not whether it is enough, in general, to describe a statutory offence in the language of the statute, but whether the offence has here been described at all. The statute provides for the punishment of those who conspire "to injure, oppress, threaten, or intimidate any citizen, with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the constitution or laws of the United States." These counts in the indictment charge, in substance, that the intent in this case was to hinder and prevent these citizens in the free exercise and enjoyment of "every, each, all, and singular" the

rights granted them by the Constitution, &c. There is no specification of any particular right. The language is broad enough to cover all.

In criminal cases, prosecuted under the laws of the United States, the accused has the constitutional right "to be informed of the nature and cause of the accusation." Amend. VI. In *United States v. Mills*, 7 Pet. 142, this was construed to mean, that the indictment must set forth the offence "with clearness and all necessary certainty, to apprise the accused of the crime with which he stands charged;" and in *United States v. Cook*, 17 Wall. 174, that "every ingredient of which the offence is composed must be accurately and clearly alleged." It is an elementary principle of criminal pleading, that where the definition of an offence, whether it be by common law or by statute, "includes generic terms, it is not sufficient that the indictment shall charge the offence in the same generic terms as in the definition; but it must state the species—it must descend to particulars. 1 Arch. Cr. Pr. and Pl., 291. The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defence, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place, and circumstance.

It is a crime to steal goods and chattels; but an indictment would be bad that did not specify with some degree of certainty the articles stolen. This, because the accused must be advised of the essential particulars of the charge against him, and the court must be able to decide whether the property taken was such as was the subject of larceny. So, too, it is in some States a crime for two or more persons to conspire to cheat and defraud another out of his property; but it has been held that an indictment for such an offence must contain allegations setting forth the means proposed to be used to accomplish the purpose. This, because, to make

such a purpose criminal, the conspiracy must be to cheat and defraud in a mode made criminal by statute; and as all cheating and defrauding has not been made criminal, it is necessary for the indictment to state the means proposed, in order that the court may see that they are in fact illegal. *State v. Parker*, 43 N. H. 83; *State v. Heach*, 40 Vt. 118; *Alderman v. The People*, 4 Mich. 414; *State v. Roberts*, 34 Me. 32. In Maine, it is an offence for two or more to conspire with the intent unlawfully and wickedly to commit any crime punishable by imprisonment in the State prison (*State v. Roberts*); but we think it will hardly be claimed that an indictment would be good under this statute, which charges the object of the conspiracy to have been "unlawfully and wickedly to commit each, every, all, and singular the crimes punishable by imprisonment in the State prison." All crimes are not so punishable. Whether a particular crime be such a one or not, is a question of law. The accused has, therefore, the right to have a specification of the charge against him in this respect, in order that he may decide whether he should present his defence by motion to quash, demurrer, or plea; and the court, that it may determine whether the facts will sustain the indictment. So here, the crime is made to consist in the unlawful combination with an intent to prevent the enjoyment of any right granted or secured by the Constitution, &c. All rights are not so granted or secured. Whether one is so or not is a question of law, to be decided by the court, not the prosecutor. Therefore, the indictment should state the particulars, to inform the court as well as the accused. It must be made to appear—that is to say, appear from the indictment, without going further—that the acts charged will, if proved, support a conviction for the offence alleged.

But it is needless to pursue the argument further. The conclusion is irresistible, that these counts are too vague and general. They lack the certainty and precision required by the established rules of criminal pleading. It follows that they are not good and sufficient in law. They are so defective that no judgment of conviction should be pronounced upon them.

The order of the Circuit Court arresting the judgment upon the verdict is, therefore, affirmed; and the cause remanded, with instructions to discharge the defendants.

MR. JUSTICE CLIFFORD dissenting.

I concur that the judgment in this case should be arrested, but for reasons quite different from those given by the court.

Power is vested in Congress to enforce by appropriate legislation the prohibition contained in the fourteenth amendment of the Constitution; and the fifth section of the Enforcement Act provides to the effect, that persons who prevent, hinder, control, or intimidate, or who attempt to prevent, hinder, control, or intimidate, any person to whom the right of suffrage is secured or guaranteed by that amendment, from exercising, or in exercising such right, by means of bribery or threats; or depriving such person of employment or occupation; or of ejecting such person from rented house, lands, or other property; or by threats of refusing to renew leases or contracts for labor; or by threats of violence to himself or family, — such person so offending shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be fined or imprisoned, or both, as therein provided. 16 Stat. 141.

Provision is also made, by sect. 6 of the same act, that, if two or more persons shall band together or conspire together, or go in disguise, upon the public highway, or upon the premises of another, with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the constitution and laws of the United States, or because of his having exercised the same, such persons shall be deemed guilty of felony, and, on conviction thereof, shall be fined or imprisoned, or both, and be further punished as therein provided.

More than one hundred persons were jointly indicted at the April Term, 1873, of the Circuit Court of the United States for the District of Louisiana, charged with offences in violation of the provisions of the Enforcement Act. By the record, it appears that the indictment contained thirty-

two counts, in two series of sixteen counts each: that the first series were drawn under the fifth and sixth sections of the act; and that the second series were drawn under the seventh section of the same act; and that the latter series charged that the prisoners are guilty of murder committed by them in the act of violating some of the provisions of the two preceding sections of that act.

Eight of the persons named in the indictment appeared on the 10th of June, 1874, and went to trial under the plea of not guilty, previously entered at the time of their arraignment. Three of those who went to trial—to wit, the three defendants named in the transcript—were found guilty by the jury on the first series of the counts of the indictment, and not guilty on the second series of the counts in the same indictment.

Subsequently the convicted defendants filed a motion for a new trial, which motion being overruled they filed a motion in arrest of judgment. Hearing was had upon that motion; and the opinions of the judges of the Circuit Court being opposed, the matter in difference was duly certified to this court, the question being whether the motion in arrest of judgment ought to be granted or denied.

Two only of the causes of arrest assigned in the motion will be considered in answering the questions certified.

(1.) Because the matters and things set forth and charged in the several counts in question do not constitute offences against the laws of the United States, and do not come within the purview, the intent, and meaning of the Enforcement Act.

(2.) Because the several counts of the indictment in question are too vague, insufficient, and uncertain to afford the accused proper notice to plead and prepare their defence, and do not set forth any offence defined by the Enforcement Act.

Four other causes of arrest were assigned; but, in the view taken of the case, it will be sufficient to examine the two causes above set forth.

Since the questions were certified into this court, the parties have been fully heard in respect to all the questions presented for decision in the transcript. Questions not pressed at the argument will not be considered; and inas-

much as the counsel in behalf of the United States confined their arguments entirely to the thirteenth, fourteenth, and sixteenth counts of the first series in the indictment, the answers may well be limited to these counts, the others being virtually abandoned. Mere introductory allegations will be omitted as unimportant, for the reason that the questions to be answered relate to the allegations of the respective counts describing the offence.

As described in the thirteenth count, the charge is, that the defendants did, at the time and place mentioned, combine, conspire, and confederate together, between and among themselves, for and with the unlawful and felonious intent and purpose one Levi Nelson and one Alexander Tillman, each of whom being then and there a citizen of the United States, of African descent, and a person of color, unlawfully and feloniously to injure, oppress, threaten, and intimidate, with the unlawful and felonious intent thereby the said persons of color, respectively, then and there to hinder and prevent in their respective and several free exercise and enjoyment of the rights, privileges, and immunities, and protection, granted and secured to them respectively as citizens of the United States and citizens of the State, by reason of their race and color; and because that they, the said persons of color, being then and there citizens of the State and of the United States, were then and there persons of African descent and race, and persons of color, and not white citizens thereof; the same being a right or privilege granted or secured to the said persons of color respectively, in common with all other good citizens of the United States, by the Federal Constitution and the laws of Congress.

Matters of law conceded, in the opinion of the court, may be assumed to be correct without argument; and, if so, then discussion is not necessary to show that every ingredient of which an offence is composed must be accurately and clearly alleged in the indictment, or the indictment will be bad, and may be quashed on motion, or the judgment may be arrested before sentence, or be reversed on a writ of error. *United States v. Cook*, 17 Wall. 174.

Offences created by statute, as well as offences at common law, must be accurately and clearly described in an indictment; and, if the offence cannot be so described without

expanding the allegations beyond the mere words of the statute, then it is clear that the allegations of the indictment must be expanded to that extent, as it is universally true that no indictment is sufficient which does not accurately and clearly allege all the ingredients of which the offence is composed, so as to bring the accused within the true intent and meaning of the statute defining the offence. Authorities of great weight, besides those referred to by me, in the dissenting opinion just read, may be found in support of that proposition. 2 East, P. C. 1124; *Dord v. People*, 9 Barb. 675; *Ike v. State*, 23 Miss. 525; *State v. Eldridge*, 7 Eng. 608.

Every offence consists of certain acts done or omitted under certain circumstances; and, in the indictment for the offence, it is not sufficient to charge the accused generally with having committed the offence, but all the circumstances constituting the offence must be specially set forth. Arch. Cr. Pl., 15th ed., 43.

Persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens thereof; and the fourteenth amendment also provides, that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. Congress may, doubtless, prohibit any violation of that provision, and may provide that any person convicted of violating the same shall be guilty of an offence, and be subject to such reasonable punishment as Congress may prescribe.

Conspiracies of the kind described in the introductory clause of the sixth section of the Enforcement Act are explicitly forbidden by the subsequent clauses of the same section; and it may be that if the indictment was for a conspiracy at common law, and was pending in a tribunal having jurisdiction of common law offences, the indictment in its present form might be sufficient, even though it contains no definite allegation whatever of any particular overt act committed by the defendants in pursuance of the alleged conspiracy.

Decided cases may doubtless be found in which it is held that an indictment for a conspiracy, at common law, may be sustained where there is an unlawful agreement between two or more persons to do an unlawful act, or to do a law-

ful act by unlawful means ; and authorities may be referred to which support the proposition, that the indictment, if the conspiracy is well pleaded is sufficient, even though it be not alleged that any overt act had been done in pursuance of the unlawful combination.

Suffice it to say, however, that the authorities to that effect are opposed by another class of authorities equally respectable, and even more numerous, which decide that the indictment is bad unless it is alleged that some overt act was committed in pursuance of the intent and purpose of the alleged conspiracy; and in all the latter class of cases it is held, that the overt act, as well as the unlawful combination, must be clearly and accurately alleged.

Two reasons of a conclusive nature, however, may be assigned which show, beyond all doubt, that it is not necessary to enter into the inquiry which class of those decisions is correct.

1. Because the common law *is not a source of jurisdiction* in the circuit courts, nor in any other Federal court.

Circuit courts have no common-law jurisdiction of offences of any grade or description ; and it is equally clear that the appellate jurisdiction of the Supreme Court does not extend to any case or any question, in a case not within the jurisdiction of the subordinate Federal courts. *State v. Wheeling Bridge Co.*, 13 How. 563 ; *United States v. Hudson et al.*, 7 Cranch, 32.

2. Because it is conceded that the offence described in the indictment is an offence created and defined by an act of Congress.

Indictments for offences created and defined by statute must in all cases follow the words of the statute ; and, where there is no departure from that rule, the indictment is in general sufficient, except in cases where the statute is elliptical, or where, by necessary implication, other constituents are component parts of the offence ; as where the words of the statute defining the offence have a compound signification, or are enlarged by what immediately precedes or follows the words describing the offence, and in the same connection. Cases of the kind do arise, as where, in the dissenting opinion in *United States v. Reese et al.*, *supra*, p. 222, it was held, that the words *offer to pay a capitation*

tax were so expanded by a succeeding clause of the same sentence that the word "offer" necessarily included readiness to perform what was offered, the provision being that the offer should be equivalent to actual performance if the offer failed to be carried into execution by the wrongful act or omission of the party to whom the offer was made.

Two offences are in fact created and defined by the sixth section of the Enforcement Act, both of which consist of a conspiracy with an intent to perpetrate a forbidden act. They are alike in respect to the conspiracy; but differ very widely in respect to the act embraced in the prohibition.

Persons, two or more, are forbidden to band or conspire together, or go in disguise upon the public highway, or on the premises of another, *with intent to violate* any provision of the Enforcement Act, which is an act of twenty-three sections.

Much discussion of that clause is certainly unnecessary, as no one of the counts under consideration is founded on it, or contains any allegations describing such an offence. Such a conspiracy with intent to injure, oppress, threaten, or intimidate any person, is also forbidden by the succeeding clause of that section, if it be done with intent to prevent or hinder his free exercise and enjoyment of *any right or privilege* granted or secured to him by the Constitution or laws of the United States, or because of having exercised the same. Sufficient appears in the thirteenth count to warrant the conclusion that the grand jury intended to charge the defendants with the second offence created and defined in the sixth section of the Enforcement Act.

Indefinite and vague as the description of the offence there defined is, it is obvious that it is greatly more so as described in the allegations of the thirteenth count. By the act of Congress, the prohibition is extended to any *right or privilege* granted or secured by the Constitution or laws of Congress; leaving it to the pleader to specify the particular right or privilege which had been invaded, in order to give the accusation that certainty which the rules of criminal pleading everywhere require in an indictment; but the pleader in this case, overlooking any necessity for any such specification, and making no attempt to comply with the rules of criminal pleading in that regard, describes the sup-

posed offence in terms much more vague and indefinite than those employed in the act of Congress.

Instead of specifying the particular right or privilege which had been invaded, the pleader proceeds to allege that the defendants, with all the others named in the indictment, did combine, conspire, and confederate together, with the unlawful intent and purpose the said persons of African descent and persons of color then and there to injure, oppress, threaten, and intimidate, and thereby then and there to hinder and prevent them in the free exercise and enjoyment of the rights, privileges, and immunities and protection granted and secured to them as citizens of the United States and citizens of the State, without any other specification of the rights, privileges, immunities, and protection which had been violated or invaded, or which were threatened, except what follows; to wit, the same being a right or privilege granted or secured in common with all other good citizens by the Constitution and laws of the United States.

Vague and indefinite allegations of the kind are not sufficient to inform the accused in a criminal prosecution of the nature and cause of the accusation against him, within the meaning of the sixth amendment of the Constitution.

Valuable rights and privileges, almost without number, are granted and secured to citizens by the Constitution and laws of Congress; none of which may be with impunity, invaded in violation of the prohibition contained in that section. Congress intended by that provision to protect citizens in the enjoyment of all such rights and privileges; but in affording such protection in the mode there provided Congress never intended to open the door to the invasion of the rule requiring certainty in criminal pleading, which for ages has been regarded as one of the great safeguards of the citizen against oppressive and groundless prosecutions.

Judge Story says the indictment must charge the time and place and nature and circumstances of the offence with clearness and certainty, so that the party may have full notice of the charge, and be able to make his defence with all reasonable knowledge and ability. 2 Story, Const., sect. 1785.

Nothing need be added to show that the fourteenth count is founded upon the same clause in the sixth section

of the Enforcement Act as the thirteenth count, which will supersede the necessity of any extended remarks to explain the nature and character of the offence there created and defined. Enough has already been remarked to show that that particular clause of the section was passed to protect citizens in the free exercise and enjoyment of every right or privilege granted or secured to them by the constitution and laws of Congress, and to provide for the punishment of those who band or conspire together, in the manner described, to injure, oppress, or intimidate any citizen, to prevent or hinder him from the free exercise and enjoyment of all such rights and privileges so granted or secured.

What is charged in the fourteenth count is, that the defendants did combine, conspire, and confederate the said citizens of African descent and persons of color to injure, oppress, threaten and intimidate, with intent the said citizens thereby to prevent and hinder in the free exercise and enjoyment of the right and privilege to vote *at any election to be thereafter had and held* according to law by the people of the State, or by the people of the parish; they, the defendants, well knowing that the said citizens were lawfully qualified to vote at any such election thereafter to be had and held.

Confessedly, some of the defects existing in the preceding count are avoided in the count in question; as, for example, the description of the particular right or privilege of the said citizens which it was the intent of the defendants to invade is clearly alleged: but the difficulty in the count is, that it does not allege for what purpose the election or elections were to be ordered, nor when or where the elections were to be held. All that is alleged upon the subject is, that it was the intent of the defendants to prevent and hinder the said citizens of African descent and persons of color in the free exercise and enjoyment of the right and privilege to vote *at any election thereafter to be had and held*, according to law, by the people of the State, or by the people of the parish, without any other allegation whatever as to the purpose of the election, or any allegation as to the time and place when and where the election was to be had and held.

Elections thereafter to be held must mean something different from pending elections; but whether the pleader

means to charge that the intent and purpose of the alleged conspiracy extended *only* to the next succeeding elections to be held in the State or parish, or to all future elections to be held in the State or parish during the lifetime of the parties, may admit of a serious question, which cannot be easily solved by anything contained in the allegations of the count.

Reasonable certainty, all will agree, is required in criminal pleading; and if so, it must be conceded, we think, that the allegation in question fails to comply with that requirement. Accused persons, as matter of common justice, ought to have the charges against them set forth in such terms that they may readily understand the nature and character of the accusation, in order that they, when arraigned, may know what answer to make to it, and that they may not be embarrassed in conducting their defence; and the charge ought also to be laid in such terms that, if the party accused is put to trial, the verdict and judgment may be pleaded in bar of a second accusation for the same offence.

Tested by these considerations, it is quite clear that the fourteenth count is not sufficient to warrant the conviction and sentence of the accused.

Defects and imperfections of the same kind as those pointed out in the thirteenth count also exist in the sixteenth count, and of a more decided character in the latter count than in the former; conclusive proof of which will appear by a brief examination of a few of the most material allegations of the charge against the defendants. Suffice it to say, without entering into details, that the introductory allegations of the count are in all respects the same as in the thirteenth and fourteenth counts. None of the introductory allegations allege that any overt act was perpetrated in pursuance of the alleged conspiracy; but the jurors proceed to present that the unlawful and felonious intent and purpose of the defendants were to prevent and hinder the said citizens of African descent and persons of color, by the means therein described, in the free exercise and enjoyment of *each, every, all, and singular the several rights and privileges* granted and secured to them by the constitution and laws of the United States in common with all other good citizens, without any attempt to describe or designate any particular

right or privilege which it was the purpose and intent of the defendants to invade, abridge or deny.

Descriptive allegations in criminal pleadings are required to be reasonably definite and certain, as a necessary safeguard to the accused against surprise, misconception, and error in conducting his defence, and in order that the judgment in the case may be a bar to a second accusation for the same charge. Considerations of the kind are entitled to respect; but it is obvious that, if such a description of the ingredient of an offence created and defined by an act of Congress is held to be sufficient, the indictment must become a *snare* to the accused; as it is scarcely possible that an allegation can be framed which would be less certain, or more at variance with the universal rule that every ingredient of the offence must be clearly and accurately described so as to bring the defendant within the true intent and meaning of the provision defining the offence. Such a vague and indefinite description of a material ingredient of the offence is not a compliance with the rules of pleading in framing an indictment. On the contrary, such an indictment is insufficient, and must be held bad on demurrer or in arrest of judgment.

Certain other causes for arresting the judgment are assigned in the record, which deny the constitutionality of the Enforcement Act; but having come to the conclusion that the indictment is insufficient, it is not necessary to consider that question.

SUPREME COURT.

Fourth Department — New York, 1876.

THE PEOPLE v. TIGHE.

At the Court of Sessions held in the county of Livingston the defendant was indicted and tried for a violation of the excise law. The indictment charged in the usual form the sale of strong and spirituous liquors and wines, in quantities of less than five gallons at a time to divers citizens of the State.

On the trial it was shown that the defendant had obtained a license on the 15th of July, 1874, commonly known as a store-keeper's license, to sell strong and spirituous liquors, not to be drank on the premises. The sale on the trial was shown to have been made under this license and not to be drank on the premises, and that they were carried off and not drank on the premises of the accused. It was admitted that the sale proved, was within the provisions of the license granted.

The district attorney placed in evidence a record of conviction of the defendant for a violation of the excise law, obtained the 9th of June, 1874, which was for a violation of the law in selling strong and spirituous liquors, ale, wine and beer, in quantities less than five gallons at a time, to be drank on the premises, and claimed that by section 4 of chapter 549 of the Laws of 1873 the license offered in evidence by the accused was forfeited and annulled, and therefore the sale admitted and proved was in violation of the law. The defendant insisted that the conviction alone, did not either annul or forfeit such licence; that it could not be revoked except by the judgment of some competent tribunal. The court held that the conviction of the defendant as proved did not of itself forfeit and annul the license under which the defendant claimed the right to sell spirituous liquors.

Held, that the conviction *ipso facto*, by the express words of the statute of 1873, operates to revoke and annul his license, and it cannot afford the accused any justification or protection.

Held, that the act of 1873, chap. 549, § 4, was intended to superadd to the provision for revoking and annulling licenses, contained in sections 25 and 26 of the act of 1857.

E. A. Nash, district attorney.

James Wood, for the defendant.

GILBERT, J.: It would not be a very unreasonable construction of the act of 1873 (chap. 549, § 4), to hold that it was intended to supersede the provision for revoking and annulling licenses, contained in sections 25 and 26 of the act of 1857. It is more probable, however, that the legislature

intended to superadd to the provision for revoking licenses contained in the act of 1857, when violations of law have been brought to light in civil prosecutions, another remedy of a like effect to follow a conviction upon an indictment for a criminal offence. The meaning of an act cannot always be found in the technical signification of its phraseology. The framers of our statutes often use technical words in a popular sense. Although, the word "conviction" is used both in sections 25 and 26 of the act of 1857, and in section 4 of the act of 1873, yet, in the former sections, it is restricted to proceedings in a suit for a penalty, or upon a bond, while in the latter there is no such restriction. Both statutes, therefore, may well stand together. Where a conviction or judgment has been obtained for a penalty, or upon a bond, the proceeding prescribed by sections 25 and 26 of the act of 1857 must be pursued. But when a licensee has been convicted upon the trial of an indictment for a criminal offence, no such proceeding is necessary. The conviction *ipso facto*, by the express words of the statute of 1873, operates to revoke and annul his licence, and it can no longer afford him any justification or protection. The twenty-ninth section of the act of 1857, makes all offences against the act misdemeanors, and prescribes the punishment therefor, and requires courts to instruct grand juries on the subject. The revocation of the license is a just addition to the punishment so prescribed, and well adapted to the case.

The judgment must be reversed and a new trial ordered in the Court of Sessions of Livingston County.

Present—MULLIN, P.J., SMITH and GILBERT, JJ.

Judgment reversed, new trial ordered, and record remitted to Court of Sessions of Livingston county.

SUPREME COURT.

Third Department—New York, 1875.

AH KING v. THE PEOPLE.

The accused was tried and convicted at the Rensselaer Court of Sessions for bigamy, in having married in Washington county while the wife of a former marriage was still living, etc. The second marriage was on the 12th of March, 1875, and the indictment was found the 26th of the same month, and it alleged the apprehension of the accused in Rensselaer county on the 23d day of March of that year. After the arrest of the accused on the 23d of March he escaped and was re-arrested in Vermont on the 26th of March, 1875. The objection is taken, that the Rensselaer county courts had no jurisdiction to indict under these facts.

Held, that the statute provides that an indictment may be found "in the county in which such person shall be apprehended." The actual arrest, before indictment found, gives jurisdiction; the escape does not take it away; nor discharge on bail destroy jurisdiction once acquired. If apprehended in the county where the indictment is afterward found, he may be there tried as if the offence had been committed there. The evidence that the defendant was arrested in Rensselaer county, is sufficient to satisfy the statute.

After the trial of this case had proceeded for a time, it was found that the accused had not been arraigned or asked to plead to the indictment. He was then arraigned and the indictment read to him. The defendant objected to any further proceedings being taken, which was overruled, and he plead not guilty. The accused again objected to any further proceedings, when the court discharged the trial jury. Afterward, upon a further prosecution of the indictment, the accused set up the former impanelling, trial and discharge of jury, as a bar to a further trial. That issue, upon this plea, was tried, and, by the direction of the court, the jury rendered a verdict against such plea, to which the accused excepted.

Held, that such partial trial, without arraignment or pleading, and such discharge of the jury, so irregularly impanelled, upon the objection of the defendant to any proceeding in the case, do not constitute legal jeopardy whereby the defendant was exempted from further prosecution upon the same indictment.

Held, that the constitutional provisions forbidding that any person be subject for the same offence to be twice put in jeopardy has been construed to mean by the courts of the United States, Massachusetts and New York, that there must have been a final verdict of conviction or acquittal upon a valid indictment.

See foot note, at the end of this case.

L. W. Rhodes, for the accused.

Jno. C. Greene, district attorney, for the people.

BOARDMAN, J. : The defendant was indicted in Rensselaer county for bigamy, in having married in Washington county while the wife of a former marriage was still living, etc. The indictment also alleged the apprehension of defendant in Rensselaer county, on the 2d day of March, 1875. The second marriage was on the twelfth March, and the indictment was preferred against defendant on the 26th March, 1875. After defendant's arrest, March twenty-third, he escaped from the officer and was re-arrested in Vermont, on the twenty-sixth March. It is objected that the Rensselaer courts had no jurisdiction to indict under these facts.

The statute (3 R. S. [5th ed.], 968, § 10) provides that an indictment may be found "in the county in which such person shall be apprehended," etc. The actual arrest, before indictment found, gives jurisdiction; the escape does not take it away; nor would discharge on bail destroy jurisdiction once acquired. If apprehended in the county where the indictment is afterward found, he may be there tried as if the offence had been committed there. The evidence that defendant was arrested in Rensselaer county is sufficient to satisfy the statute. Whether the warrant was valid or void is immaterial, as long as an officer of the county arrested the defendant for a criminal offence of this character. The officer had authority to make such arrest at his peril. If defendant is not guilty of the crime charged, he may test the right of the officer to arrest him by action.

After the trial of the defendant upon the indictment had gone on some time, it was discovered that the defendant had not been arraigned and the indictment read to him. The defendant objected to any further proceedings being taken. The objection was overruled, and on request the defendant plead not guilty. The defendant again objected to any further proceedings, and the court thereupon discharged the jury.

Afterward, upon a further prosecution of defendant under said indictment, he interposed a special plea, setting up the former impanelling, trial and discharge of jury, as a bar to further trial. The issue so formed by this plea was tried, and, by direction of the court, the jury rendered a verdict against such plea, to which defendant excepted. No formal judgment seems to have been made or entered upon

the trial of such special plea. It is now attempted to review such trial in connection with, and as a part of, the subsequent trial of the defendant upon the merits, after a plea of not guilty entered by order of the court. I am of the opinion that we cannot review such preliminary trial, after a trial upon the merits, upon this writ of error and return. Both parties desire the opinion of this court as to the effect of such partial trial and discharge of the jury. Though the question is not before us, we express the opinion that the irregularity was of such a character as to justify the court in the exercise of its discretion in discharging the jury; that such discharge was with the implied consent of the defendant, who objected to any further proceedings in the case; that such partial trial without arraignment or pleading, and such discharge of the jury, so irregularly impanelled, upon the objection of the defendant to any further proceedings in the case, do not constitute legal jeopardy whereby the defendant was exempted from further prosecution upon the same indictment. What constitutes legal jeopardy has led to much discussion and diverse constructions. By most courts the constitutional provisions forbidding that any person be subject for the same offence to be twice put in jeopardy (U. S. Const., art. 5, of amendts. ; N. Y. Const., art. 1, § 6) are construed to mean nothing more than the common-law rule as applied in the plea of *autre fois acquit*. In such construction there must have been a final verdict of conviction or acquittal upon a valid indictment. Such is the rule in the United States Courts (*U. S. v. Gibert*, 2 Sumn., 41); in Massachusetts (*Com. v. Bowden*, 9 Mass., 494); in New York (*Shepherd v. People*, 25 N. Y., 406); and in many other States, as may be seen by reference to 1 Wharton American Criminal Law, sections 482-587. In other courts and in other States a very technical rule is adopted. A prisoner is held to have been once in jeopardy if a jury has been impanelled and discharged, or allowed to separate before or without a verdict. (Whart., §§ 573-580.) I think that our courts have not gone beyond this: that a prisoner is once in jeopardy when he has been arraigned and pleaded to a valid indictment, a jury has been sworn, and evidence given, and then, without his consent, a juror has been withdrawn or (which is the same thing) the

jury discharged. (*People v. Barrett*, 2 Cai., 304.) By this decision it was properly held that the people could not put off the trial of a case, after it had once properly begun, without the prisoner's consent. The case under consideration was not such an attempt. If the arraignment of the prisoner and his plea to the indictment were essential to a valid conviction upon the trial begun, then the court below was right in treating all that had occurred as worthless and unlawful, and in discharging a jury never legally impanelled. Where, by reason of any defect, a motion in arrest would prevail, the prisoner has not been in peril. (Whart., § 587; *Shepherd v. People*, *supra*, 417.)

If the irregularity was not fatal to any conviction that might be had, and the prisoner yet insisted upon the defect and objected to further proceedings upon the trial, that was equivalent to asking for the discharge of the jury and consenting thereto. The general opinion is, that the consent of the prisoner to the discharge of the jury will obviate any objection founded on his constitutional privilege. (*U. S. v. Perez*, 9 Wheat., 579; Whart., § 591 and notes.)

The defendant is indicted for bigamy, and the evidence of his guilt is overwhelming. In fact he has been defended upon technicalities alone. No defence upon the merits is urged. If justice cannot be outwitted, the defendant must be punished; if it can be evaded, the defendant goes at large, presumably innocent, though notoriously guilty.

The conviction and judgment should be affirmed, and the sentence pronounced should be executed.

Present — LEARNED, P.J., BOARDMAN and JAMES, JJ.

Conviction and judgment affirmed.

NOTE. — Section three hundred of the Penal Code, in relation to where an indictment for bigamy may be found, is now in force. That section reads: "§ 300. An indictment for bigamy may be found in the county in which the defendant is arrested, and the like proceedings, including the trial, judgment, and conviction, may be had in that county, as if the offence were committed therein."

The Code of Criminal Procedure has defined the plea of *autre fois convict*. The section is as follows: § 9. No person can be subjected to a second prosecution for a crime for which he has once been prosecuted, and duly convicted. Ed.

SUPREME COURT.

Third Department—New York, 1875.

HOWELL, and Another, v. THE PEOPLE.

The accused were tried at a Court of Sessions held in Fulton County, for a violation of the excise law.

After the charge of the court, one of the jurors stated that one of them thought they had better retire. In answer to this the court said that the evidence was uncontradicted and undisputed and that they would not allow the jury to retire. The court then directed the jury to find the accused guilty.

To this direction their counsel excepted.

Under this direction of the court the jury found the defendants guilty of the misdemeanor charged in the indictment, and they were sentenced.

Held, that it was error for the court to direct a verdict of guilty. The defendants were entitled to a jury trial. The right to a trial by a jury means, that the persons indicted are entitled to have the question of their guilt passed upon by the jury. It does not mean that the court is to decide that question. The action of the court below was erroneous in law, and dangerous as a precedent.

H. B. Cushney, for the accused.

H. E. Smith, for the people.

LEARNED, P. J.: We think it was error for the court to direct a verdict of guilty. The defendants were entitled to a jury trial. And it is for the public interest that this right should be preserved. (*The People v. Cancemi*, 18 N. Y., 128.) The right to trial by a jury means that the persons indicted are entitled to have the question of their guilt passed upon by the jury. It does not mean that the court is to decide that question, and the jury are only to utter the verdict of the court. It is true that the court may direct, and in a proper case ought to direct, a verdict of acquittal. (*The People v. Bennett*, 49 N. Y., 137; *Duffy v. The People*, 26 id., 588.) Of this the prisoner cannot complain. And the State has no right to put him to the peril of a trial when its own court says that there is no sufficient evidence of his guilt. But to direct his acquittal is one thing, to direct his conviction is another; as any prisoner on trial would know. Thus it is said that the court may direct a verdict of acquit-

tal, because, if the defendant were convicted by the jury, the court would have the power to grant a new trial, if the verdict were against evidence. (*United States v. Fullerton*, 7 Blatch. C. C., 177.) But if the jury should acquit, could the court grant the people a new trial, and put the prisoner in jeopardy again? The very power, then, of granting a new trial, which, by implication, is said to authorize a direction to acquit, does not exist in the case of an acquittal by a jury. No implication, then, authorizes a direction to convict.

So it is said that the court is the judge of the law, and the jury of the fact; that is, it is the duty of the jury "to be governed by the instructions of the court as to all legal questions involved in such [general] verdicts. They have the power to do otherwise, but the exercise of such power cannot be regarded as rightful, although the law has provided *no means, in criminal cases*, of reviewing their decisions, whether of law or fact." (*Duffy v. People, ut supra.*)

In the present case, the court might have said to the jury: If you find that the prisoners did so and so, it will be your duty to convict them. But even then, if the jury had disregarded such instructions and had acquitted, that would have been a matter for their consciences. It is better that, in some rare case, a jury should violate their duty and acquit a prisoner, unquestionably guilty, than that the power to compel a conviction should be in the hands of the court. Thus, even before the passage of the libel bill, and when the courts were asserting, in the strongest manner, their right to decide questions of law in criminal prosecutions for libel, Lord MANSFIELD said, in the *Dean of St. Asaph's Case*:

"It is the duty of the judge, in all cases of general justice, to tell the jury how to do right, though they have it in their power to do wrong, which is a matter entirely between God and their own consciences." (21 State Trials, 1040.)

Such language could not have been used, if that great judge had supposed that the court could not only tell the jury how to do right, but could compel them to render such verdict as the court chose.

The present case was undoubtedly plain on the evidence.

But it is in just such plain cases that danger to the system of trial by the jury may creep in. If the defendants had been indicted for murder, no matter how plain the evidence, no court would have dared direct a verdict of guilty, while a plea of not guilty stood on the record. The defendants had the same rights in this case.

A distinction was suggested between offences in which *intent* is a necessary ingredient, and those in which it is not. There is no such limitation of the right of trial by jury. Again, in a certain sense, intent enters into all offences; not, perhaps, intent to do wrong, but, at least, an intent to do the act. The only case relied upon to sustain this conviction, is that of *The United States v. Anthony* (11 Blatch., 200). The real object of that trial was rather to obtain an authoritative decision on the question involved, than to punish the defendant. The fine imposed was small, and there was no commitment for non-payment. Still it is to be regretted that the learned judge who tried the case did not content himself with declaring the law as to the right to vote. In assuming the power to direct a verdict of guilty, we think he violated a well established and most valuable rule of law. Unfortunately there was no right of appeal. The action of the learned judge, however, was criticised in an able report of Senator Carpenter, made to the senate of the United States (Documents 1874, vol. 2, No. 472); and by the judiciary committee of the house. (Documents 1874, vol. 3, No. 608.) The only arguments in support of the court in that case are, that the court is the judge of the law; and that it may direct an acquittal. These arguments have been already considered. No precedent is found sustaining that decision. The contrary is assumed in the able examination as to the right of juries, in the *State v. Croteau* (23 Vt., 14), and seems to follow from the decisions in *Commonwealth v. Potter* (10 Metc., 263), and *Commonwealth v. White* (id., 14).

Courts once claimed the right to punish jurors for wrong verdicts. That no such right exists was settled in the famous Bushnell's Case (Vaughan, 135). And it is well said in that old case:

"For if the judge from the evidence shall by his own judgment first resolve, upon any trial, what the fact is, and so, knowing the fact, shall then resolve what the law is and

order the jury penally to find accordingly, what either necessary or convenient use can be fancied of juries, or to continue trials by them at all?"

So Chief Justice *Shaw*, in *The Commonwealth v. Porter* (*ut supra*), after saying that a jury may render a general verdict, adds, that if "the court should express or intimate any opinion upon any such question of fact, it is within the legitimate province of the jury to revise, reconsider and decide, contrary to such opinion, if in their judgment it is not correct, and warranted by the evidence."

It follows, therefore, that no court has power to direct a verdict of guilty.

We think the action of the court below was erroneous in law, and dangerous as a precedent.

The judgment and conviction should be reversed and a new trial granted.

Present—LEARNED, P. J., BOARDMAN, and BOCKES, J.J.

SUPREME COURT.

Fourth Department—New York, 1876.

HUFFSTATER V. THE PEOPLE.

The accused was tried in the Court of Sessions of Jefferson county, upon an indictment charging him with selling "strong and spirituous liquors and wines, in quantities less than five gallons at a time," without having a license therefor. There was no allegation in the indictment that the selling was of liquors "to be drank on the premises."

On the trial it was shown that the accused had a storekeeper's license, which authorized him to sell in quantities less than five gallons at a time, but not to be drank on the premises. It was also shown that the accused made sales of liquor, by the glass, to be drank in his store.

The counsel for the accused asked the court to rule: 1st. That the indictment was insufficient, in that it should have been under the fourteenth section of the act of 1857, instead of the thirteenth section. 2d. That the license proved was an absolute protection to the accused for any sales proved.

The court overruled these objections, severally, and the accused excepted.

Held, that the gist of the offence of which the accused was convicted, consisted not of the act of selling, but of the purpose for which the sale was made. He had a license which authorized him to make the sale, but he was pro-

hibited from making any sale of spirituous liquors to be drank on his premises. There is no averment in the indictment that the accused violated that prohibition.

Held, that the selling without a license is a distinct offence from that a person commits when licensed as a storekeeper he sells to be drank on the premises. It is as necessary to aver the illegal purpose of the sale in the latter case, as a want of the license in the former. To make out the offence, it must be proved that the accused not only sold the liquor, but that he sold it to be drank on the premises. Whatever is essential to be proved must be averred.

Held, that the rule of law upon this subject is elementary, and requires that the accused be specially brought within all the material words of the statute, and nothing can be taken by intendment.

Anson B. Moore, for the accused.

Watson M. Rogers, for the people.

GILBERT, J.: The gist of the offence of which the plaintiff in error was convicted, consisted not of the act of selling, but of the purpose for which the sale was made. He had a license which authorized him to make the sale, but he was prohibited from making any sale of spirituous liquors to be drank on his premises. There is no averment in the indictment that the plaintiff in error violated that prohibition. It is contended on the part of the people that the averment of sales without having a license therefor is sufficient to uphold a conviction for such violation. We cannot assent to that proposition. The selling without a license to sell is a distinct offence from that which a person licensed to sell commits when he sells to be drank on the premises. It is quite as necessary to aver the illegal purpose of the sale in the latter case, as the want of a license in the former. To make out the offence intended by the pleader, it must be proved that the accused not only sold the liquor, but that he sold it to be drank on the premises. Whatever is essential to be proved must be averred. It follows that the plaintiff has been indicted for one offence and convicted of another. We think such a conviction ought not to be sustained. The rule of law upon this subject is elementary, and requires that the defendant be specially brought within all the material words of the statute, and nothing can be

taken by intendment. (Whart. Cr. L., 364-380 ; *Wood v. People*, 53 N. Y., 511.)

The conviction must be reversed, and, if the plaintiff in error is in prison, the statute (2 R. S., 741, § 26) requires that he be absolutely discharged.

Present—MULLIN, P.J.; SMITH and GILBERT, JJ.

SUPREME COURT.

Second Department—New York, 1875.

THE PEOPLE V. SATTERLEE.

The defendant was indicted and tried at the Court of Sessions held in the county of Suffolk.

There were two counts in the indictment, one for rape, and the other for an assault with an intent to commit a rape.

The jury brought in a verdict for rape.

The counsel for the prisoner, upon the trial, requested the court to require the district attorney to elect on which count he should proceed, which request was denied.

Held, that the denial of such request was no error. The two counts were drawn solely to meet the different aspects in which the evidence might be viewed by the jury.

The defendant had a separate trial, and George Jones, who was jointly indicted with the defendant, was sworn, under objection, as a witness on that trial.

Held, that he was a proper witness on the defendant's separate trial.

On the trial the defendant was sworn on his own behalf, and denied his guilt. For the purpose of affecting the credibility of the defendant as a witness, there was received in evidence a record of conviction of the defendant for larceny, second offence, on plea of guilty.

Held, that such evidence was properly received, for the purpose of affecting the credibility of the witness. Such evidence was held admissible in *Carpenter v. Nixon*, 5 Hill, 260 ; *Lake v. The People*, 1 Park. Cr., 495, 523, and in *Newcomb v. Griswold*, 24 N. Y., 298.

—, for the accused.

J. H. Tuthill, for the people.

BARNARD, P.J.: The prisoner was indicted at the Suffolk Sessions. The indictment contained two counts, one for rape and one for assault with intent to commit a rape. The jury convicted him of rape.

The prisoner's request that the district attorney be required to elect on which count he should proceed, was properly denied. There was but one transaction out of which the indictment grew. Two counts were drawn solely to meet the different aspects in which the evidence might be viewed by the jury.

George Jones, jointly indicted with the prisoner, was a proper witness on the prisoner's separate trial. (*Wixon v. The People*, 5 Park., 119.)

The only remaining question is as to the admission of the record of conviction for petit larceny. The prisoner was sworn on his own behalf, and very fully denied his guilt. To affect his credibility, the people offered in evidence a record of conviction, at the Suffolk Sessions, of Brewster Bailey, *alias* Brewster Satterlee, for larceny, second offence, on plea of guilty. Proof was given on the trial that the prisoner was called by the names of Brewster Bailey and Brewster Satterlee. We think the evidence was properly received. Such evidence is held admissible to affect the credit of a witness, in *Carpenter v. Nixon* (5 Hill, 280). It was received in *Lake v. The People* (1 Park. Cr., 495, 523), and on appeal no dissent was expressed to its reception, though it was pronounced weak evidence in that case, as having been rendered twenty-five years before the witness was sworn. In *Newcomb v. Griswold* (24 N. Y., 298), the Court of Appeals say: "It seems that proof of conviction for petit larceny was competent by way of impeachment." In the same case the general rule is stated, that evidence to impeach a witness must be confined to the witness' general reputation. The defects in the record, if any, do not affect the question.

The conviction should be affirmed.

Present: BARNARD, P. J., TAPPEN and TALCOTT, JJ.

Conviction affirmed.

SUPREME COURT.

Fourth Department—New York, 1875.

GIBSON V. THE PEOPLE.

The Court of Sessions of Niagara county, with a jury, tried the accused upon an indictment which set out his former conviction of the crime of grand larceny, and his sentence to State prison, and then alleged that "having been duly discharged and remitted of such judgment and conviction," afterwards committed petit larceny.

The accused pleaded guilty, and when brought up for judgment, claimed that he was only indicted for petit larceny. This claim was overruled and he was sentenced to State prison for one year and three months.

Held, that the Revised Statutes under which he was indicted, tried, convicted and sentenced provides that, "if any person, convicted of any offence punishable by imprisonment in a State prison, shall be discharged, either upon being pardoned or upon expiration of his sentence, and shall subsequently be convicted of any offence committed after such pardon or discharge, he shall be punished," etc., and where the allegation is, as in this indictment, "having been duly discharged and remitted of such judgment and conviction" the allegation is sufficiently broad and definite to bring the case within the provisions of the statute. The word *duly* means, in a proper way, or according to law. The word *remitted*, as applicable to a crime, means pardoned. The allegation in this indictment would then read, has been duly or according to law discharged and pardoned of such judgment and conviction. Such allegation that he has been according to law discharged and pardoned, substantially meets the statute.

The dicta in *Wood v. The People*, 1 Cowen's Crim. Rep., 554, commented upon. See foot note, at the end of this case.

Ransom & Joyce, for the accused.

F. Brundage, for the people.

MERWIN, J.: The statute (2 R. S., 699, § 8) provides that "if any person, convicted of any offence punishable by imprisonment in a State prison, *shall be discharged*, either *upon being pardoned or upon the expiration of his sentence*, and shall subsequently be convicted of any offence after such pardon or discharge, he shall be punished," etc., stating the manner. In the case at bar, the allegation in the indictment is, "*having been duly discharged and remitted of such judgment and conviction.*" The question is, is the

allegation sufficiently broad or definite to bring the case within the provisions of the statute?

In *Wood v. The People* (53 N. Y., 511; *S. C.*, 1 Cowen's Crim. Rep., 554), the phraseology of the indictment was exactly similar to this. Proof was given of former conviction and sentence, but none of imprisonment thereunder, or of a discharge, and the point was, whether it was necessary for the people to show a discharge from imprisonment, either by pardon or by the expiration of his term. The Court of Appeals held it was, and reversed the judgment and ordered a new trial. *Allen, J.*, in giving the opinion, says the indictment was defective in not alleging in terms a discharge either upon pardon or on the expiration of the sentence. This point was not in the case, but the opinion is entitled to much weight, as that of an able and upright judge. If the allegation was simply that the defendant "had been duly discharged," there would be much force in the reasoning that it was defective. For, under that allegation, a discharge might have occurred through an arrest or reversal of judgment, or upon *habeas corpus*, as well as upon the expiration of the sentence; and the defendant could well say he had the right to know what was alleged against him in that behalf. But the allegation in this case is more: "duly discharged and remitted of such judgment and conviction." The word *duly* means, in a proper way, or regularly, or according to law. (*People v. Walker*, 23 Barb., 304; *Fryatt v. Lindo*, 3 Edwards' Ch., 239; *Burns v. People*, 59 Barb., 531.) The word remitted, as applicable to a crime, means pardoned. (Webster's Dictionary.) The allegation would then read, has been duly or according to law discharged and pardoned of such judgment and conviction. The statute, in one alternative, is, shall be discharged upon being pardoned. The statute, of course, means pardoned according to law. Why, then, does not the allegation that he has been according to law discharged and pardoned, substantially meet the statute? A plea of guilty is the highest of conviction (1 Chit. Cr. Law, 428), and no intendment should be held in the defendant's favor, except such as have a substantial basis.

No proceedings on an indictment shall be affected by reason of any defect or imperfection in matters of form, which

shall not tend to the prejudice of the defendant. (2 R. S., 728, § 52.)

The charge in the indictment should be so alleged as to be intelligible in its legal requisites, and inform the defendant what he has to meet. (*Edmunds, J.*, in *Biggs v. People*, 8 Barb., 551.) All formal defect should be disregarded which do not prejudice the defendant. (*Tuttle v. People*, 36 N. Y., 436; *Burns v. People*, 59 Barb., 531; *People v. Tredway*, 3 id., 470; *People v. Powers*, 2 Sald., 50; 5 Park. Cr., 31; 3 id., 330.)

There is no doubt that the defects, if any, in this case, did not prejudice the defendant, and I think they were entirely formal.

Judgment should be affirmed.

Present: SMITH, P. J., GILBERT and MERWIN, JJ.

Judgment affirmed.

NOTE:—The legislature by the provisions of the Penal Code has materially changed the Revised Statutes, construed and commented upon in the foregoing case and in *Wood v. The People*, 1 Cowen's Crim. Rep., 554.

The sections of the Penal Code read as follows:

"§ 688. A person who, after being convicted within this State of a felony, or an attempt to commit a felony, or of petit larceny, or, under the laws of any other State, government or country, of a crime which, if committed within this State, would be a felony, commits any crime within this State, is punishable, upon conviction of such second offence, as follows:

1. If the subsequent crime is such that, upon a first conviction, the offender might be punished, in the discretion of the court, by imprisonment for life, he must be sentenced to a State prison for life;

2. If the subsequent crime is such that, upon a first conviction, the offender would be punishable by imprisonment for any term less than his natural life, then such person must be sentenced to imprisonment for a term not less than the longest term, nor more than twice the longest term, prescribed upon a first conviction.

"§ 689. A person, who having been convicted within this State of a misdemeanor, afterwards commits and is convicted of a felony, must be sentenced to imprisonment for the longest term prescribed for the punishment upon a first conviction for the felony.

"§ 690. Where a person is hereafter convicted of a felony, who has been, before that conviction, convicted in this State, of any other crime, or where a person is hereafter convicted of a misdemeanor who has been already five times convicted in this State of a misdemeanor, he may be adjudged by the court, in addition to any other punishment inflicted upon him, to be an habitual criminal.

"§ 691. The person of an habitual criminal shall be at all times subject to the supervision of every judicial magistrate of the county, and of the supervisors and overseers of the poor of the town where the criminal may be found, to the same extent that a minor is subject to the control of his parent or guardian.

"§ 692. The governor may grant a pardon which shall relieve from judgment of habitual criminality as from any other sentence; but upon a subsequent conviction for felony of a person so pardoned, a judgment of habitual criminality may be again pronounced on account of the first conviction, notwithstanding such pardon." Ed.

SUPREME COURT OF THE UNITED STATES.

1876.

WIGGINS v. THE UNITED STATES.

The accused was indicted and tried in the Territory of Utah, for the crime of murder in killing one John Kramer, commonly called Dutch John, and the jury rendered a verdict of murder in the first degree. Sentence in due form of law was rendered by the court.

The prisoner excepted to the rulings and instructions of the court, and appealed to the Supreme Court of the Territory, where the judgment of the subordinate court was affirmed. The prisoner sued out a writ of error, and removed the cause into this court.

Held, that sect. 3 of the act of Congress of June 23, 1874 (18 Stat. 254), allows a writ of error from this court to the Supreme Court of the Territory of Utah, where the defendant has been convicted of bigamy or polygamy, or has been sentenced to death for any crime.

The principal error assigned by the accused and the only one upon which this appellate court passed is, "That the court erred in sustaining the ruling of the District Court, that the uncommunicated threats of the deceased, made in connection with the exhibition of a pistol a short time before the homicide, were inadmissible in evidence to the jury." The testimony which was ruled out by the trial court and upon which this assignment of error is based is as follows:—"The defendant, on the trial of this cause, called Robert Heslop as a witness in his defence, who testified:

- "That, just a short time before the shooting, the deceased showed him a pistol which he (deceased) then had on his person. Deceased, at this time, was sitting on a box on the opposite side of the street from the Salt Lake House, and in front of Reggle's store.
- "The prosecuting attorney admitted that this was after the deceased was ejected from defendant's saloon.
- "Whereupon the counsel for the defendant asked witness the following questions :—
- "What, if any, threats did the deceased make against the defendant at this time? which was objected to by the prosecuting attorney, for the reason it was immaterial.
- "The objection was sustained by the court, and the defendant, by his counsel, then and there duly excepted.
- "Defendant's counsel then asked witness, what, if anything, did deceased then say concerning the defendant.
- "(Objected to by prosecuting attorney as incompetent.)
- "Defendant's counsel thereupon stated that they expected to prove by this witness that in that conversation, a short time prior to the killing, the deceased, in the hearing of the said witness, made the threat that he would kill the defendant before he went to bed on the night of the homicide, which threats we cannot bring home to the knowledge of the defendant.
- "Which was objected to by the counsel for the prosecution, because it was incompetent.
- "The objection was sustained by the court, to which the defendant then and there excepted.
- "This witness and several others, testified that the deceased's general character was bad, and that he was a dangerous, violent, vindictive and brutal man."

Held, that the rule in regard to the admission of threats of the deceased against the prisoner in a case of homicide, where the threats have not been communicated to him, established by the decisions of courts of high authority is :—

"Where the question is as to what was deceased's attitude at the time of the fatal encounter, recent threats may become relevant to show that this attitude was one hostile to the defendant, even though such threats were not communicated to defendant. The evidence is not relevant to show the *quo animo* of the defendant, but it may be relevant to show that, at the time of the meeting, the deceased was seeking defendant's life."

Held further, that evidence of uncommunicated threats are always admitted in the trial of an indictment for murder, when it appears that other evidence has been introduced tending to show that the act of homicide was committed in self-defence, and that the evidence of such threats may tend to confirm or explain that defence, and in the state of mind produced on the jury by the other testimony produced, have turned the scale in favor of the defendant. In the condition of the testimony as it stood in this case the questions and offer were relevant to the issue, and should have been received.

Mr. George H. Williams, for the accused.

Mr. Solicitor-General Phillips, for the United States.

MR. JUSTICE MILLER delivered the opinion of the court.

Sect. 3 of the act of Congress of June 23, 1874 (18 Stat., 254), allows a writ of error from this court to the Supreme Court of the Territory of Utah, where the defendant has been convicted of bigamy or polygamy, or has been sentenced to death for any crime. The present writ is brought under that statute to obtain a review of a sentence of death against the plaintiff in error for the murder of John Kramer, commonly called Dutch John, in Salt Lake City. The only error insisted upon by counsel, who argued this case orally, was the rejection of testimony offered by the prisoner, as shown by the following extract from the bill of exceptions :—

“The defendant, on the trial of this cause, called Robert Heslop as a witness in his defence, who testified :—

“That, just a short time before the shooting, the deceased showed him a pistol, which he (deceased) then had upon his person. Deceased, at this time, was sitting on a box on the opposite side of the street from the Salt Lake House, and in front of Reggle’s store.

“The prosecuting attorney admitted that this was after the deceased was ejected from defendant’s saloon.

“Whereupon the counsel for the defendant asked witness the following questions :—

“‘What, if any, threats did the deceased make against the defendant at this time?’ which was objected to by the prosecuting attorney, for the reason it was immaterial.

“The objection was sustained by the court, and the defendant, by his counsel, then and there duly excepted.

“Defendant’s counsel then asked witness, ‘What, if anything, did deceased then say concerning the defendant?’

“(Objected to by prosecuting attorney as incompetent.)

“Defendant’s counsel thereupon stated that they expected to prove by this witness that in that conversation, a short time prior to the killing, the deceased, in the hearing of said witness, made the threat that he would kill the defendant before he went to bed on the night of the homicide, which threats we cannot bring home to the knowledge of the defendant.

"Which was objected to by the counsel for the prosecution, because it was incompetent.

"The objection was sustained by the court, to which the defendant then and there excepted.

"This witness, and several others, testified that the deceased's general character was bad, and that he was a dangerous, violent, vindictive, and brutal man."

Although there is some conflict of authority as to the admission of threats of the deceased against the prisoner in a case of homicide, where the threats had not been communicated to him, there is a modification of the doctrine in more recent times, established by the decisions of courts of high authority, which is very well stated by Wharton, in his work on Criminal Law, § 1027:

"Where the question is as to what was deceased's attitude at the time of the fatal encounter, recent threats may become relevant to show that this attitude was one hostile to the defendant, even though such threats were not communicated to defendant. The evidence is not relevant to show the *quo animo* of the defendant, but it may be relevant to show that, at the time of the meeting, the deceased was seeking defendant's life." *Stokes v. People of New York*, 53 N. Y., 174; *Keena v. State*, 18 Ga., 194; *Campbell v. People*, 16 Ill., 18; *Holler v. State*, 37 Ind., 57; *People v. Arnold*, 15 Cal., 476; *People v. Scroggins*, 37 id., 676.

Counsel for the government, conceding this principle to be sound, sustains the ruling of the court below, on the ground that there is no evidence in the case to show any hostile movement or attitude of the deceased towards the prisoner at the time of the fatal shot, and that there is conclusive evidence to the contrary. In support of this latter position, he relies on the testimony of Thomas Dobson, the only witness of the meeting which resulted in the death of deceased by a pistol-shot from defendant.

Before criticising Dobson's testimony, it is necessary to state some preliminary matters.

It appears that, on the night of the homicide, the deceased and a man of similar character, called Bill Dean, got into a quarrel, in a drinking-saloon kept by defendant, in which

they both drew pistols. Defendant interposed, and took their pistols from them, and turned them out of his saloon by different doors. He gave Dean his pistol as he turned him out, and asserts that he also returned the deceased *his* pistol; but of this there is doubt. Shortly after this, he started homewards, and fell in company with Dobson, who was a night-watchman of Salt Lake City. As they went along the street, Dean was discovered in the recess of a doorway on the sidewalk with a pistol in his hands, and defendant went up to him, took it away from him, and he ran down the street. Passing on, Dobson and defendant came in front of a hotel, the Salt Lake House, where the homicide occurred, of which Dobson, the only witness, tells his story thus:—

“As I came down street, about two o’clock in the morning, I saw Dutch John sitting on the carriage-steps of the Salt Lake House, with his face resting on his hands, apparently in a stupor or asleep. Wiggins, the defendant, was with me. He (Wiggins) jumped to my rear, and immediately the firing commenced. I do not know, I cannot tell, who fired the first shot. At the first report, I turned round and saw the blaze of the second shot from a pistol in the hands of Wiggins. I had advanced to the carriage-steps, and said, ‘Jack, don’t kill him.’ Wiggins then jumped on carriage-steps and fired another shot, which passed right by in front of me and into the body of Dutch John. Dutch John grabbed me around the legs, and we fell over the steps into the street. When I turned and saw the first shot from Wiggins’ pistol, I saw Dutch John’s hands raised, and heard him cry out, ‘Don’t kill me; I am not armed.’ Immediately after the firing ceased, Wiggins stooped down as if to pick up something, and when he raised up he had something in his left hand; but I cannot tell whether it was a pistol or not. At the same time, Wiggins made the remark to the deceased, ‘You wanted to kill me’ or ‘You tried to kill me,’ I am not sure which expression was used.”

If we are to believe implicitly all that is here said by this witness, we do not see in it conclusive evidence that defend-

ant fired the first shot, and that no previous demonstration was made by deceased. On the contrary, he says he does not know, and cannot tell, who fired the first shot. He does say, that, when the vision of Dutch John met their eyes, the defendant "jumped behind witness, and *immediately*" (that is, just after) "the firing commenced." He also says, that, immediately after the firing ceased, defendant stooped down as if to pick up something, and arose with something in his hand.

We do not think that this statement proves at all, certainly not conclusively, that deceased did *not* fire the first shot. Either there must have been some reason for defendant's jumping behind witness, and he must have picked up a pistol which fell from the hands of deceased, or he was guilty of consummate acting, for the purpose of deceiving witness, and making evidence to defend himself from the charge of a murder which he intended to commit.

It is difficult to believe that, on a sudden encounter, any one would have such cool deliberation; and it is much more reasonable to believe that the seeking of safety, by jumping behind the witness, was caused by some movement or other evidence of hostile intent by deceased which escaped the less vigilant eye of witness, and that it was the display of the pistol which the defendant afterwards picked up. This latter view is supported by other testimony, to be presently noticed.

But it is pertinent here to remark, that both the effect of this witness' testimony and his credibility were to be weighed by the jury, and that doubt was thrown on the latter by showing, that, in the preliminary examination, he had made statements at variance with what he now stated, which were more favorable to defendant.

Take all these together, and we think the court had no right to assume that it was beyond doubt that defendant had committed the assault, which resulted in death, by firing the first shot, without any cause, real or apparent. In this we are confirmed by other parts of the testimony displayed in the bill of exceptions.

It is nowhere asserted that defendant fired more than three shots. A witness however who was within hearing, swears positively that he heard four shots. In agreement

with this, it is proved, without contradiction, that when defendant was arrested, immediately after the shooting, three pistols were found on him. Of one of these, three barrels were empty; of another, one; and the third was fully loaded. The police-officer who arrested defendant says of these pistols, "the one identified as Dutch John's had one chamber empty; the one identified as Bean's had three chambers empty; and the Derringer was loaded." It is a fair inference that the three empty barrels were those he had discharged at deceased, and that the other was the one he had picked up after the shooting, which had been in the hands of deceased.

Whence comes the fourth shot, and who emptied the chamber of deceased's pistol? That deceased had a pistol with him is a concession made by the prosecuting attorney on the trial. It will be seen in the extract from the bill of exceptions first given, that the witness, Heslop, testifies positively, that, just a short time before the shooting, the deceased showed him a pistol, which he then had on his person, while sitting on a box on the side of the street opposite the scene of the homicide; and the prosecution admitted that this was after the deceased had been ejected from the saloon.

Here, then, was a man who had, a few hours or minutes before, had a difficulty, in which pistols were drawn; who was known to be of desperate and vindictive character; who had shown a witness a pistol within a few minutes preceding the fatal encounter, and that pistol was, after the encounter, picked up on the sidewalk, where it occurred, with a chamber empty. Also, strong evidence to show that one more shot was fired than defendant had fired, and the probability that it came from the pistol of deceased at that time.

Now, when, under all these circumstances, the witness, and the only witness who was present at the encounter, swears that he cannot tell where the first shot came from, though he knows that defendant only fired three, it must be very apparent, that if the person, to whom the deceased exhibited that pistol a few minutes before the shooting, had been permitted to tell the jury that deceased then said, "he would kill the defendant before he went to bed that night," it would have tended strongly to show where that first shot

came from, and how that pistol, with one chamber emptied, came to be found on the ground. This testimony might, in the state of mind produced on the jury by the other evidence we have considered, have turned the scale in favor of defendant. At all events, we are of opinion that in that condition of things it was relevant to the issue, and should have been admitted.

Judgment reversed, with directions to set aside the verdict, and grant a new trial.

MR. JUSTICE CLIFFORD dissenting. Murder is the charge preferred against the prisoner, which, at common law, is defined to be, when a person of sound memory and discretion unlawfully killeth any reasonable creature in being, and in the peace of the State, with malice aforethought, either express or implied. Modern statutes defining murder in many cases affix degrees to the offence, according to the nature and aggravation of the circumstances under which the act of homicide is committed.

Offences against the lives and persons of individuals are defined by the statutes of Utah, as follows: Whoever kills any human being, with malice aforethought, the statute of the Territory enacts, is guilty of murder; and the succeeding section of the same act provides that all murder perpetrated by poison or by lying in wait, or by any other kind of wilful, deliberate, and premeditated killing, or which is committed in the perpetration, or attempt to perpetrate, any one of the offences therein enumerated, is murder in the first degree, and shall be punished with death. Laws Utah, 51, c. 21, tit. 2, secs. 4, 5.

Pursuant to that enactment, the grand jury of the third judicial district, in due form of law, preferred an indictment against the prisoner for the murder of John Kramer, charging that he, the prisoner, did, at the time and in the manner and by the means therein described, feloniously, wilfully, deliberately, premeditatedly, and with malice aforethought, kill and murder the deceased, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the people of the United States resident in the said Territory.

Sufficient appears to show that the prisoner was arraigned

in due form of law, and that he pleaded to the indictment that he was not guilty, as required by the statute of the Territory; that, material witnesses for the prisoner being absent, the indictment was on his motion continued to the next term of the court. Both parties being ready at the succeeding term of the court, the jury was duly impanelled, and sworn well and truly to try the issue, as provided by law. Witnesses were called and examined by the prosecution and for the defence, and the cause was regularly committed to the jury having the prisoner in charge.

None of these proceedings are called in question; and it appears that the jury retired, and, having duly considered the case, returned into court, and gave their verdict that the prisoner is guilty of murder in the first degree. Sentence in due form of law was rendered by the court, as more fully appears in the record; and the prisoner excepted to the rulings and instructions of the court, and appealed to the Supreme Court of the Territory, as he had by law a right to do, where the judgment of the subordinate court was affirmed. Laws Utah, 66, c. 31, sect. 5.

Error lies from that court to the Supreme Court, in criminal cases, where the accused has been sentenced to capital punishment; and the record shows that the prisoner sued out a writ of error, and removed the cause into this court. 18 Stat. 254.

Four errors are assigned in the transcript:

1. That the court erred in affirming the judgment of the District Court.
2. That the court erred in holding that the affidavit offered to procure a continuance was insufficient.
3. That the court erred in sustaining the ruling of the District Court, that the uncommunicated threats of the deceased, made in connection with the exhibition of a pistol a short time before the homicide, were inadmissible in evidence to the jury.
4. That the court erred in overruling the exceptions of the prisoner to the instructions given to the jury by the District Court.

Two of the errors assigned — to wit, the second and fourth — having been abandoned here in the argument for the prisoner, the re-examination of the case will be confined to the

third assigned error, as the only remaining one which deserves any special consideration.

Expert testimony, not in any way contradicted, was introduced by the prosecutor to the effect that the witness saw the deceased immediately after he came to his death, and he testified that he made a *post-mortem* examination of the body the next day; that the deceased received two pistol wounds; that one shot struck him in the side, a little back of a middle line from the hollow of the arm down and just at the border of the ribs; and the witness stated that he examined that wound, but that he did not trace the ball, as the other wound was the one that proved fatal; that the other shot struck him in the chin, and that, ranging downward, it cut the external jugular vein, the ball burying itself in the muscles of the shoulder, and that the deceased bled to death from that wound; and the witness added, to the effect that from the course the ball took, and the wounds it made in its course, the deceased must have been sitting at the time with his head bowed down and resting on his breast.

Death ensued immediately; and the record discloses what immediately preceded the homicide and what occurred at the time it was committed. Beyond doubt, the homicide occurred about two o'clock in the morning; and it is equally certain that it was effected by the described shots from a pistol. Prior to that time, — say about one o'clock or a little later, — the deceased, with six or seven other persons, was in the saloon of the prisoner, and it appears that the deceased and two of the others had a difficulty, and that one of them was struck over the head in the affray. Revolvers were drawn by the deceased and one Bean, when the prisoner interfered and took the pistols from both of them, and in the scuffle struck the deceased over the head. He then put Bean out of the back-door, gave him his pistol, and told him to go home; and he put the deceased out of the front-door, and told him to go home. Half an hour or more later the prisoner came down the street with one of the witnesses for the prosecution, and when they arrived in front of the Salt Lake House the witness states that he saw the deceased sitting on the carriage-steps of the hotel, with his face resting on his hands, apparently in a stupor or asleep; that the prisoner jumped to the rear of the witness,

and that the firing immediately commenced ; that the witness did not know, and cannot tell, who fired the first shot ; that at the first report he, the witness, turned round and saw the blaze of the second shot from a pistol in the hands of the prisoner. Witness advanced to the carriage-steps, and he testifies that he said to the prisoner, "Jack, don't kill him," to which it seems no response was given. Instead of that, the prisoner then jumped to the carriage-steps and fired another shot, which, as the witness states, passed right in front of him into the body of the deceased. Something may be inferred as to its effect, from the fact that the deceased raised his hands, as the witness states, and that he heard him say, "Don't kill me, I am not armed." Immediately after the firing ceased the prisoner stooped down as if to pick up something, and when he rose up the witness noticed that he had something in his left hand, but the witness is not able to state what it was.

Three witnesses testify that there were three shots fired in rapid succession in front of the hotel, and one of them states that he heard a fourth shot farther down the street.

Two of the witnesses concur that the first shot ranged from east to west, and that the range of the other two bore a little to the north of west.

Several witnesses were examined for the defence, and one of them testified that the deceased, when he was put out of the saloon and told to go home, said he would go if the prisoner would give him his gun, and that the prisoner pushed him out of the door and handed him his pistol, and that the deceased remarked, "I will make it hot for you." Testimony was also given by another witness called for the defence, to the effect that the deceased, after he was ejected from the saloon, showed the witness a pistol when he was sitting in front of a store opposite the Salt Lake House.

Two questions were asked the witness, as follows :

1. What, if any, threats did the deceased make against the prisoner ?
2. What, if anything, did the deceased say concerning the prisoner ?

Objection was made to each question, and both were excluded by the court, and the prisoner excepted to the respective rulings. Had the questions been admitted, the

prisoner expected to prove that the deceased made the threat that he would kill the prisoner before he went to bed that night; but the defence admitted that the evidence would not show that the prisoner had knowledge of the threat at the time of the killing. Due exception was taken to the ruling, which is the basis of the assignment of error not waived by the prisoner. Evidence was also introduced by the defence that the general character of the deceased was bad, and that he was a dangerous, violent, and brutal man.

Subsequent to the affray in the saloon, and before the homicide, the deceased had a conversation with another witness called and examined by the prosecution. He said that the prisoner had taken his pistol from him and beat him over the head with it, and it appears that he showed the witness the wounds in his head. About an hour or less after that interview they met again, in front of the hotel, and walked up the street together, and in the course of the conversation the witness asked him if he was armed, and the deceased gave the witness very positive assurance that he was not, that he had no weapon about him except a pocket-knife, which he showed the witness. Presently the deceased left and went down the street, and the witness, in about a minute, started in the same direction, and as he passed the saloon where the affray occurred the prisoner came out and commenced conversing with the witness. Among other things, he said that the deceased and Bean had a difficulty in his saloon, and that he took their pistols away from them and beat them over the head with the pistols; that he put one of them out of the back-door and the other out of the front-door; that he gave Bean back his pistol, and told him that they could not have any trouble in the saloon; that if there was to be any killing there, he was going to do it himself. At that stage of the conversation the witness asked him what he did with the pistol of the deceased, and the witness states that the prisoner pulled back the lapel of his coat, and said, "I have it here." Immaterial matters are omitted. Suffice it to say, the prisoner proceeded down the street, and the witness soon followed; and when the latter got around Godbe's corner he heard a shot fired, then he turned and ran back toward the hotel, and when he turned the corner he saw the flash and heard the report of two other

shots, and when he got in front of Hall's saloon he heard another shot further down the street.

Four shots were heard ; and the witness, who was a police-officer, states that when he came in front of the hotel he was requested to arrest the prisoner, and that he ran toward the corner where the prisoner was crossing and called to him to stop, and that he came back, and that they started up the street, when the following conversation ensued: "I said, 'Jack, I guess you have killed Dutch John.' He said, 'If I haven't, I will.' When they got in front of the hotel, I asked him for his pistol. He handed me one, saying, 'That is Bill Bean's;' and another, 'That is Dutch John's;' and a third one, a single-barreled Derringer, and said, 'This is mine.'" One chamber was empty in the pistol identified as Dutch John's, and three chambers were empty in the one identified as Bean's, and the Derringer was loaded.

Questions of the kind involved in the single assignment of error to be re-examined cannot be understandingly determined without a clear view of what the state of the case was at the time the ruling was made, and inasmuch as it is the judgment of the Supreme Court of the Territory to which the writ of error is addressed, it seems to be just and right that the reasons which that court assigned for affirming the judgment of the subordinate court should receive due consideration.

Enough appears to show that the prisoner insisted that the evidence of uncommunicated threats should have been admitted, because there is a conflict in the testimony as to who fired the first shot, and that the evidence of the threats, if it had been admitted, would have aided the jury in determining that question. Influenced by that suggestion, the first step of the court, apparently, was to examine the evidence reported in the transcript ; and, having come to the conclusion that there is no conflict in the evidence as to who fired the first shot, they decided that the ruling of the District Court excepted to, in excluding the two questions as to the threats, is correct.

Introductory to that conclusion, they find the facts to be, that the deceased was sitting upon a carriage-step in front of the hotel, with his hands up to his face and his head bowed down, apparently in a stupor or asleep, as the prisoner

and the night-watch came near, and that the prisoner, as they were passing, jumped behind the witness, and that the firing immediately commenced, the testimony of two witnesses being that the firing was from east to west, and that the prisoner was east of the deceased. Obviously, they regarded the statement of the witness, that he did not know who fired the first shot, as merely negative testimony; for they proceed to state that the positive testimony of the two witnesses, that the firing was from east to west, showed that it was impossible that the deceased should have fired the first shot.

In the next place, they advert to the statement that the prisoner stooped down, just after the shooting, as if to pick up something, and to the testimony of one of his witnesses that he exhibited a pistol shortly before his death; and they remark, that the testimony, if no other facts were found, might tend to prove that the deceased had a pistol in his possession, but that it would not be sufficient to raise a doubt as to who fired the first shot.

Even conceding the truth of the testimony, they still were of the opinion that the prisoner was the aggressor; but they proceed to say that they did not think that the deceased even had a pistol, and gave their reasons for the conclusion as follows:

"His pistol was in the hands of the prisoner just before and just after the killing, and if the deceased had a pistol, as one witness testifies, shortly before his death, it is evident that he did not have it when he was killed, for after the first shot he threw up his arms and said, 'Don't kill me, I am unarmed,' a thing which it is not reasonable to suppose he would have said if he had just fired the first shot, and, besides, no such pistol was found on his person or near him after the killing." "If the prisoner had picked up an additional pistol, it would certainly have been found upon him; but such was not the fact;" and they add, that "this second pistol, if any existed, could not have been in the possession of the deceased when he was killed."

Suppose the facts to be as found by the Supreme Court of the Territory, then it follows that there was no evidence in the case tending to show that the deceased was the aggressor, or that the act of homicide was perpetrated in self-

defence, within the principles of the criminal law as understood and administered in any jurisdiction where our language is spoken.

Homicide, apparently unnecessary or wilful, is presumed to be malicious, and, of course, amounts to murder, unless the contrary appears from circumstances of alleviation, excuse, or justification; and it is incumbent upon the prisoner to make out such circumstances to the satisfaction of the jury, unless they arise from the evidence produced against him by the prosecution. *Fost. Cr. L.* 255; 1 *East, P. C.* 224; 4 *Bl. Com.* 201; 1 *Russ., C. & M.* (4th ed.) 483.

Cases arise, as all agree, where a person assailed may, without retreating, oppose force to force, even to the death of the assailant; and other cases arise in which the accused cannot avail himself of the plea of self-defence, without showing that he retreated as far as he could with safety, and then killed the assailant only for the preservation of his own life. *Fost. Cr. L.* 275; 1 *East, P. C.* 277; 4 *Bl. Com.* 184.

Courts and text-writers have not always stated the rules of decision applicable in defences of the kind in the same forms of expression. None more favorable to the accused have been promulgated anywhere than those which were adopted seventy years ago, in the trial of Selfridge for manslaughter. *Pamph. Rep.*, 160.

Three propositions were laid down in that case:

1. That a man who, in the lawful pursuit of his business, is attacked by another, under circumstances which denote an intention to take away his life and do him some enormous bodily harm, may lawfully kill the assailant, provided he use all the means in his power otherwise to save his own life or prevent the intended harm, such as retreating as far as he can, or disabling his adversary without killing him, if it be in his power.

2. That when the attack on him is so sudden, fierce, and violent, that a retreat would not diminish but increase his danger, he may instantly kill his adversary without retreating at all.

3. That when, from the nature of the attack, there is reasonable ground to believe that there is a design to destroy his life or to commit any felony upon his person, the kill-

ing the assailant will be excusable homicide, although it should afterwards appear that no felony was intended.

Learned jurists excepted at the time to the third proposition as too favorable to the accused ; but it is safe to affirm that the legal profession have come to the conclusion that it is sound law, in a case where it is applicable. Support to that proposition is found in numerous cases of high authority, to a few of which reference will be made.

When one without fault is attacked by another, under such circumstance as to furnish reasonable ground for apprehending a design to take away his life or do him some great bodily harm, and there is reasonable ground for believing the danger imminent that such design will be accomplished, the assailed may safely act upon the appearances and kill the assailant, if that be necessary to avoid the apprehended danger ; and the killing will be justified, although it may afterwards turn out that the appearances were false, and that there was not in fact either design to do him serious injury, or danger that it would be done. *Shorter v. People*, 2 Comst. 197 ; *People v. McLeod*, 1 Hill, 420 ; 1 Hawk. P. C., ch. 9, sect. 1, p. 79.

Two other cases decided in the same State have adopted the same rule of decision, and it appears to be well founded in reason and justice. *Patterson v. People*, 46 Barb., 635 ; *People v. Sullivan*, 3 Seld. 400 ; *State v. Sloan*, 47 Mo. 612 ; Whart. on Homicide, 212 ; *State v. Baker*, 1 Jones (N. C.), 272 ; *Com. v. Drum*, 58 Penn. St. 9.

Unless the party has reasonable ground of apprehension at the time, the justification will fail ; it being settled law that a bare fear, unaccompanied by any overt act indicative of the supposed intention, will not warrant the party entertaining such fears in killing the other party by way of precaution, if there be no actual danger at the time. 1 East, P. C. 272 ; Ros. Crim. Ev. (7th Am. ed.) 768 ; *State v. Scott*, 4 Ired. 409 ; *State v. Harris*, 4 Jones, 190 ; *Dill v. State*, 25 Ala. 15 ; *Dyson v. State*, 26 Miss. 362 ; *Holmes v. State*, 23 Ala. 24 ; *Carroll v. State*, 23 id. 33.

Two grounds are assumed in support of the proposition that the evidence of previous threats ought to have been admitted :

1. That it would have confirmed the other evidence introduced by the prisoner to prove that he committed the act of homicide in self-defence.

2. That it would have aided the jury in determining which of the parties fired the first shot.

Remarks already made are sufficient to show that a bare fear of danger to life, unaccompanied by any overt act or manifestation indicative of a felonious intent to that effect, will not justify the person entertaining such fears in killing the supposed assailant. Such a defence is not made out unless all the conditions of the proposition before explained concur in the immediate circumstances which attend the act of homicide.

When a person apprehends that another, manifesting by his attitude a hostile intention, is about to take his life, or to do him enormous bodily harm, and there is reasonable ground for believing the danger imminent that such design will be accomplished, he may, if no other practicable means of escape are at hand, oppose force by force, and may even kill the assailant, if that be necessary to avoid the apprehended danger; but he must act and decide as to the necessity and the force of the circumstances at his peril, and with the understanding that his conduct is subject to judicial investigation and review.

Apply that rule to the case before the court, and it is clear that there was no evidence in the case tending to show that the prisoner killed the deceased in self-defence. Proof to that effect is entirely wanting, and every attending circumstance disproves the theory, and shows that such a defence, if it was set up in the court below, was utterly destitute of every pretence of foundation, as appears from the following circumstances:

1. That the prisoner was not alone.

2. That when he, in company with the night-watchman, approached the hotel, the deceased was sitting on the steps, asleep or in a stupor, apparently unaware of their approach.

3. That the prisoner might have passed on, turned back, or stood still in perfect safety.

4. That if he feared anything, his needful protection was at hand.

5. That the deceased neither spoke nor moved, and was as harmless as if he had been inanimate matter.

6. That the prisoner, better than any one else except the sleeping man, knew that the deceased was unarmed, because he, the prisoner, had the pistol of the deceased in his own pocket. 1 Gabb. Cr. L. 496.

Viewed in the light of the attending circumstances, it is amazing that any one can come to the conclusion that there is any evidence tending to show that the prisoner, as a reasonable being, could have believed that it was necessary to take the life of the deceased in order to save his own life, or to save himself from enormous bodily harm. *Logue v. Com.*, 38 Penn. St. 265.

Stronger evidence of express malice is seldom or never exhibited, as appears from the fact that he continued to fire after the wounded man threw up his hands and cried out, "Don't kill me, I am unarmed," and also from the fact that when the police-officer remarked to him, "Jack, I guess you have killed Dutch John," he said, "If I haven't, I will."

Testimony merely confirmatory of a proposition, wholly unsupported by other evidence, is not admissible as substantive evidence. Grant that, and still it is insisted by the prisoner that the evidence of previous threats made by the deceased should have been admitted to confirm the evidence introduced by the prisoner, to prove that the deceased fired the first shot.

Mere theories are not entitled to consideration, unless they find some support in the evidence. There is no evidence in the case tending to show that the deceased fired the first shot, or that he fired at all, or that he manifested any intention to offer violence whatever to the prisoner. Two witnesses testify that the prisoner, when he jumped behind the night-watchman, was east of the deceased, and that the range of the firing was from east to west, fully justifying the conclusion of the court below that it is impossible that the deceased should have fired the first shot.

Better reasons for the admissibility of the evidence must be given than those suggested in the preceding propositions, else the assignment of errors cannot be sustained, as it is clear that the other evidence in the case discloses no real

theory of defence which the excluded testimony would tend to confirm.

Some stress is laid upon the fact that one witness testified that the deceased showed him a pistol after he was ejected from the saloon ; but the answer to that, given by the court below, is quite satisfactory, which is, that the pistol of the deceased was in the possession of the prisoner just before and immediately after the killing, and that if the deceased had a pistol, as the witness testified, it is evident he did not have it when he was killed, for after the first shot he threw up his hand, and said, "Don't kill me, I am unarmed." Declarations of the kind made in *articulo mortis* are competent evidence ; and, there being nothing in the case to contradict the statement, it is entitled to credit. 1 Greenl. Ev., sect. 156 ; Ros. Crim. Ev. (7th ed.) 30.

Four shots were fired ; and when the prisoner was arrested, immediately after the homicide, he gave up three pistols to the officer,—his own, the deceased's, and Bean's. There was one empty chamber in the deceased's pistol, and three empty chambers in Bean's, showing that the prisoner had been in no danger throughout, except from the multiplicity of fire-arms which he had in his own pockets.

Attempt is next made in argument to show that evidence of previous threats made by the deceased is admissible in behalf of the prisoner, even though he did not introduce any other evidence which it tends to confirm, the suggestion being that the modern decisions support that proposition.

Criminal homicide, in order that it may amount to murder, must have been perpetrated with malice aforethought ; and the prosecution, to prove the ingredient of malice, may introduce evidence of lying in wait, antecedent menaces, former grudges, or any formed design or concerted scheme to do the deceased bodily harm. Malice is the essential criterion by which murder is distinguished from manslaughter, and of course it must be charged in the indictment and proved at the trial. Acts, conduct, and declarations of the kind, if done or made by the prisoner, are clearly admissible when offered by the prosecution ; but the case is generally different when the evidence is offered in respect to the deceased.

Years ago evidence was offered in a case of manslaughter,

to show that the deceased was well known by the defendant and others as a drunken, quarrelsome man; but the court excluded the testimony, holding to the effect that the evidence was immaterial, as it constituted no defence to the accused. *State v. Field*, 14 Me. 244.

Later the defendant in another jurisdiction offered evidence to prove that the deceased was a man of great muscular strength, practised in seizing persons by the throat in a peculiar way, which would render them helpless and shortly deprive them of life; but the court excluded the evidence, holding that the only evidence which was relevant and material was the manner in which the deceased assaulted the defendant at the time of the homicide. *Com. v. Mead*, 12 Gray, 169.

Decided cases, too numerous for citation, are reported, in which it is held that evidence of the bad character of the deceased is not admissible in an indictment for felonious homicide, for the reason that it cannot have any effect to excuse or palliate the offence. Reported cases of an exceptional character may be found where it is held that evidence of the dangerous character of the deceased may be admitted to confirm other evidence offered by the prisoner, to show that the killing was in self-defence. 2 Bishop Crim. Proced. (2d ed.) sect. 627.

Difficult questions also arise in other cases, as to the admissibility of previous threats made by the deceased. Judges and text-writers generally agree that such threats, not communicated to the prisoner, are not admissible evidence for the defence, where the charge is felonious homicide.

Courts of justice everywhere agree that neither the bad character of the deceased nor any threats that he may have made forfeits his right of life, until, by some actual attempt to execute his threats, or by some act or demonstration at the time of the killing, taken in connection with such character and threats, he induces a reasonable belief on the part of the slayer that it is necessary to deprive him of life in order to save his own or to prevent some felony upon his person. *Prichett v. State*, 22 Ala. 39; *Com. v. Hilliard*, 2 Gray, 294.

Exceptional cases arise where it is held that the evidence

should be received as confirmatory of other evidence in the case tending to support the theory that the killing was in self-defence. Cases of that character may be found where courts have ruled that evidence of the kind may be admitted, even though the prisoner had no knowledge of the same at the time of the alleged felonious homicide; but there is not a well-considered case to be found anywhere, in which it is held that evidence of previous threats is admissible as substantive proof that the act of homicide was committed in self-defence, nor which shows that such evidence is admissible for any purpose, whether the threats were known or unknown to the prisoner, except to confirm or explain other evidence in the case, tending to justify or excuse the homicidal act, as having been committed in opposing force to force in defence of life, or to avoid enormous bodily harm. 2 Whart. Cr. L. (6th ed.) 1020; 1 Hale, P. C. 481.

Provided the uttering of the threats was known to the prisoner, the tendency of modern decisions is to admit the evidence, even if the other evidence to support the theory of self-defence is slight, and to exclude it in all cases where the threats have not been communicated, unless the circumstances tend strongly to inculcate the deceased as the first aggressor. *People v. Lamb*, 2 Keyes, 486; *Powell v. State*, 19 Ala. 577; *Dupree v. State*, 33 id. 380.

Examples, almost without number, are found in the reported cases, which support those propositions, to a few of which reference will be made.

Violent threats were made by the deceased against the prisoner in the case of *Stokes v. People*, 53 N. Y. 174; and the court held that proof of the same was admissible, whether known to the prisoner or not, inasmuch as other evidence had been given making it a question for the jury whether the homicidal act was or was not perpetrated by the prisoner in defending himself against an attempt of the deceased to take his life or to commit a felony upon his person.

Authorities to show that fear only is not sufficient to justify the taking of the life of another have already been referred to, of which there are many more. *State v. Collins*, 32 Iowa, 38; Whart. Homicide, 407.

Pursuant to that rule, it was held, in the case of *Newcomb v. State*, 37 Miss. 400, that the belief on the part of the ac-

cused that the deceased designed to kill him is no excuse for the homicidal act, unless the deceased at the time made some attempt to execute such a design, and thereby induced the accused reasonably to believe that he intended to do so immediately. Hence the court held that it was not competent for the accused to introduce evidence of an assault that the deceased committed on him six weeks before, nor to give evidence of previous uncommunicated threats, the other evidence showing that the deceased at the time of the killing made no hostile demonstration against the accused calculated to show that the accused was in any danger of life or limb.

Actual danger of the kind, or a reasonable belief of such actual danger, must exist at the time, else the justification will fail. Repeated threats, even of a desperate and lawless man, will not and ought not to authorize the person threatened to take the life of the threatener, nor will any demonstration of hostility, short of a manifest attempt to commit a felony, justify a measure so extreme.

Reasonable doubt upon that subject cannot be entertained; but the Supreme Court of Kentucky decided, that, where one's life had been repeatedly threatened by such an enemy, and it appeared that he had recently been exposed to an attempt by the same person to assassinate him, and that the previous threats were continued, the person threatened might still go about his lawful business, and if on such an occasion he happened to meet the threatener, having reason to believe him to be armed and ready to execute his murderous intention, and if he did so believe, and from the threats, the previous attempt at assassination, the character of the man, and the circumstances attending the meeting, he had a right to believe that the presence of his adversary put his life in imminent peril, and that he could secure his personal safety in no other way than to kill the supposed assailant, he was not obliged to wait until he was actually assailed. *Bohammon v. Com.*, 8 Bush, 488.

Beyond all doubt, that is the strongest case to support the theory set up for the prisoner in this case to be found in the judicial reports, and yet it is obvious that it does not make an approach to what is necessary to constitute a defence for the crime charged against the prisoner in the indictment.

Except where threats are recent, and were accompanied by acts and conduct indicative of an intention to execute the threatened purpose, the evidence of previous threats is not admitted by the Supreme Court of Arkansas. *Atkins v. State*, 16 Ark. 584; *Pitman v. State*, 22 id. 357.

Where the evidence of previous threats is necessary, in connection with the other evidence, to make out a case of self-defence, the Supreme Court of Indiana hold that the evidence is admissible. *Holler v. State*, 37 Ind. 61.

Jurists and text-writers appear to concur that antecedent threats *alone*, whether communicated or not, will not justify a subsequent deadly assault by the other party, unless the party who made the previous threats manifests at the time of the act, a design to carry the threats into immediate effect. *People v. Scroggins*, 37 Cal. 683.

Argument to establish that proposition seems to be unnecessary in this case, as the legislature of the Territory have enacted that a bare fear that a felony is about to be committed "shall not be sufficient to justify the killing" in such a case. "It must appear that the circumstances were sufficient to excite the fears of a reasonable person, and that the party killing really acted under the influence of those fears, and not in a spirit of revenge," showing that the court below could not have decided otherwise than they did without violating the statute law of the Territory. *Laws Utah*, p. 60, sect. 112.

Weighed in the light of the adjudged cases, it is clear that the evidence of previous uncommunicated threats is never admitted in the trial of an indictment for murder, unless it appears that other evidence has been introduced tending to show that the act of homicide was committed in self-defence, and that the evidence of such threats may tend to confirm or explain the other evidence introduced to establish that defence.

Society, in my opinion, is deeply interested that criminal justice shall be accurately and firmly administered; and, being unable to concur in the opinion and judgment of the court in this case, I have deemed it proper to state the reasons for my dissent.

SUPREME COURT OF THE UNITED STATES.

1876.

SMITH V. THE UNITED STATES.

Error to the Supreme Court of Washington Territory.

The accused had escaped and was not actually or constructively within the control of the court.

Held, that it was within the discretion of the court to hear a criminal case, where the convicted party was not within its control and where he cannot be made to respond to any judgment which the court might render.

Mr. John McGilord, for the accused.

Mr. Solicitor-General Phillips, for the United States.

Mr. Chief Justice WAITE delivered the opinion of the court.

It is clearly within our discretion to refuse to hear a criminal case in error, unless the convicted party, suing out the writ, is where he can be made to respond to any judgment we may render. In this case it is admitted that the plaintiff in error has escaped, and is not within the control of the court below, either actually, by being in custody, or constructively, by being out on bail. If we affirm the judgment, he is not likely to appear to submit to his sentence. If we reverse it and order a new trial, he will appear or not, as he may consider most for his interest. Under such circumstances, we are not inclined to hear and decide what may prove to be a moot case.

This cause was docketed here Dec. 29, 1870. In due time a brief was filed on behalf of the plaintiff in error, and the cause has been regularly continued at every term since, no one appearing here in person to represent the plaintiff. At this term we dismissed the writ, on motion of the United States, for want of prosecution, but have since reinstated it on motion of the counsel for the plaintiff in error, who now moves to have it set down for argument. This motion we deny, and order that, unless the plaintiff in error submit himself to the jurisdiction of the court below on or before

the first day of our next term, the cause to be left off the docket after that time. *The People v. Genet*, 59 N. Y., 80; *Leftwich's Case*, 20 Gratt. 723; *Commonwealth v. Andrews*, 97 Mass. 544; see also 31 Me. 592.

Motion to set down the case for argument denied.

COURT OF APPEALS.

NEW YORK, 1878.

LESSER v. THE PEOPLE.

The accused was tried and convicted in the Court of Sessions in and for the county of New York, of the crime of obtaining goods by false pretences. The General Term affirmed the conviction and from that affirmation the accused brings error.

The indictment charged that the prisoner represented, among other things, that the check was good and a valuable security, and of the value of \$255; whereas it was not good, or of any value whatever.

The evidence was, that after bargaining for the goods, Melville the confederate went out as he said to get money to pay for them. While Melville was away the accused said to complainant that Melville was a man of business having two stores. Melville returned with a check post-dated. Melville said it was too late to go to the bank that day, when the prisoner said that the check was good, and also that Steinbach, the maker of the check, "had a business." The evidence also showed that no such person as the drawer of the check kept any account in the bank on which it was drawn. It was admitted on the trial by the accused that the check was worthless. The defendant relied solely on the fact that the check was post-dated.

Held, that the evidence was sufficient to justify a finding that the prisoner represented that the check was good, and the maker a man of substance; while he knew that it was worthless, and that it was a false token got up for the purpose of defrauding the prosecutrix, and that the accused and Melville were confederates, and jointly obtained the goods.

William F. Kintzing, for the accused.

Benj. K. Phelps, for the people.

RAPALLO, J. The check which was passed off upon the complainant, was dated on the twenty-ninth of August, the transaction taking place on the twenty-eighth, and the defence is placed upon the point that a delivery of a post-

dated check does not constitute a representation that the money to meet it is in the bank at the time of delivery of the check, but simply an undertaking that it shall be there at the maturity of the check.

If there had been no representation made except by the delivery of the check, and the prosecution rested wholly on the allegation that this was a representation that the money was in bank, the point which the prisoner's counsel seeks to raise would be in the case, and the circumstance that the check was not drawn by the prisoner, but by a third party, and was post-dated, would be very material. But we do not think the case turns upon the point argued. The indictment charges that the prisoner represented, among other things, that the check was good and a valuable security, and of the value of \$255; whereas it was not good, or of any value whatever. The evidence of the prosecutrix was that the prisoner and his companion Melville came together to her residence, and after bargaining for the goods, and agreeing upon the price, Melville went out, as he said, to get the money to pay for them, leaving the prisoner there; that the prisoner represented Melville as a man in business, having two stores, etc.; that Melville returned with the check, and at the time of passing it off to prosecutrix and obtaining the goods, in answer to a remark of the prosecutrix's sister that the check was dated the twenty-ninth, said, "it is too late to go to the bank to-day" (it being then half-past three in the afternoon); that at the same time the prisoner said that the check was good, and also that Steinbach, the maker of the check, "had a business." The sister testified that, in answer to her remark about the date, Melville said, that it was too late to go to the bank, and he dated the check for to-morrow. No such person as the drawer of the check kept any account in the bank on which it was drawn, and it was admitted on the trial that the check was worthless. The circumstances tended to show that the transaction was a device to defraud the prosecutrix of her goods, and that Melville and the prisoner were acting in concert. They together took the goods away. No explanation or defence was offered by the prisoner on the trial, nor did he show that there was any such person as Steinbach, or what

were his own relations with Melville, but he relied wholly on the fact that the check was post-dated.

Under the circumstances we think that the evidence, although meagre, was sufficient to justify a finding that the prisoner represented that the check was good, and the maker a man of substance ; while he knew that it was worthless, and was a false token got up for the purpose of defrauding the prosecutrix, and that he and Melville were confederates, and jointly obtained the goods. The question of the prisoner's guilt was fairly submitted to the jury, and there is no legal error in the conviction.

The judgment should be affirmed.

All concur.

Judgment affirmed.

COURT OF APPEALS.

NEW YORK, 1878.

POLINSKY v. THE PEOPLE.

The accused was convicted upon a general plea of guilty to an indictment, and sentenced, by the Court of General Sessions of the city of New York, to imprisonment in the penitentiary of the city of New York for thirty days, and to pay a fine of \$200.

The indictment charged the defendant with exposing for sale in the city of New York, impure and unwholesome milk, adulterated with water, against the form of the statute ; with keeping and offering such unwholesome milk for sale in violation of the sanitary code and of the statute, and, with bringing it into the city of New York for sale, in violation of an ordinance of the sanitary code, passed by the board of health of the city, February 28, 1876, of which the publication is alleged, and which is set out in the third count in full.

The General Term of the Supreme Court, in the first judicial district, affirmed the judgment, and the defendant brought error.

The question presented is as to the validity of the sentence.

Held, that by the Laws of 1862, as amended by section 1 of chapter 544 of the Laws of 1864, the knowingly selling or exposing for sale of impure, adulterated or unwholesome milk is made a misdemeanor, punishable by a fine of not less than fifty dollars, and if the fine is not paid, by imprisonment for not less than thirty days in the penitentiary or county jail, or until the fine be paid. Section 4 declares that the addition of water or any substance,

other than is sufficient to preserve the milk while in transportation to market, is an adulteration. This is a general statute.

Held, that the board of health of the city of New York, February 23, 1876, enacted the following ordinance, and made it a part of the sanitary code: "No milk which has been watered, adulterated, reduced or changed in any respect by the addition of water or other substance, or by the removal of cream, shall be brought into, held, kept or offered for sale at any place in the city of New York, nor shall any one keep, have, or offer for sale any such milk."

Held, that the authority to pass sanitary ordinances was conferred on the board of health of the city of New York by chapter 385 of the Laws of 1873, which created the board.

Held, that the eighty-second section of that act requires the board to adapt the existing sanitary ordinances to the changes made by the act, in the administration of the sanitary affairs of the city, and authorizes and empowers the board to add to the sanitary code, from time to time, additional provisions for the security of life and health in the city, and declares that any violation of the code shall be treated and punished as a misdemeanor, and the offender shall also be liable to pay a penalty of fifty dollars, to be recovered in a civil action in the name of the mayor, aldermen and commonalty of the city.

Held, that the third count of the indictment was drawn with reference to the ordinance cited, and to ascertain the specific punishment for the offence, reference must be had to the general statute, which enacts that "every person who shall be convicted of any misdemeanor, the punishment of which is not prescribed in this or some other statute, shall be punished by imprisonment in the county jail not exceeding one year, or by a fine not exceeding \$250, or by both such fine and imprisonment."

Held, that the court in this case imposed its sentence of fine and imprisonment under the third count of the indictment which described the crime to be a violation of the ordinance, which violation was declared to be a misdemeanor, the punishment of which was nowhere prescribed except in the revised statutes, which is recited above.

Held, that the joinder of several distinct misdemeanors in the same indictment is not a cause for the reversal of the judgment on writ of error when the sentence is single, and is appropriate to either of the counts upon which the conviction was had.

Held, that the Legislature in the exercise of its constitutional authority may lawfully confer on boards of health the power to enact sanitary ordinances, having the force of law within the districts over which their jurisdiction extends. This power has been repeatedly recognized and affirmed, and ordinances designed to prevent the sale of adulterated milk are manifestly within the scope of sanitary regulations.

Held, that the statute of 1862, relates only to *selling or exposing* impure or adulterated milk for sale, while the offence in the ordinance is, *bringing adulterated milk into the city of New York for sale*, therefore a greater punishment can be inflicted under the ordinance than is authorized by the statute.

Duplicity in the third count was urged on the ground that such count united the offence of bringing impure milk into the city for sale with the charge of offer-

ing it for sale ; the one being a violation of the ordinance, and the other a violation of the statute — offences requiring different punishments.

Held, that the objection of duplicity is not well taken. The third count purports to proceed exclusively upon the ordinance, and would not justify a conviction under the statute, although it contains averments which might sustain a count for the statutory offence. The allegation of the offering of the milk for sale may be rejected as surplusage, leaving the conviction to stand upon the charge of bringing it into the city for sale.

Hugh Coleman, for the prisoner.

W. P. Prentice, for the people.

ANDREWS, J. The indictment contains three counts. The first count charges the defendant with exposing for sale in the city of New York impure and unwholesome milk, adulterated with water, against the form of the statute. The second charges that he kept and offered it for sale in violation of the sanitary code and of the statute. The third charges him with bringing it into the city of New York for sale, in violation of an ordinance of the sanitary code, passed by the board of health of the city February 23, 1876, of which due publication is alleged, and which is set out in the count in full. The plaintiff in error on his arraignment in the Court of General Sessions pleaded guilty to the whole indictment, and the court thereupon sentenced him to imprisonment in the penitentiary of the city of New York for thirty days, and to pay a fine of \$200. The main question presented is as to the validity of the sentence.

By section 1 of chapter 467 of the Laws of 1862, entitled "an act to prevent the adulteration of milk, and prevent the traffic in impure and unwholesome milk," as amended by section 1 of chapter 544 of the Laws of 1864, the knowingly selling or exposing for sale impure, adulterated or unwholesome milk is made a misdemeanor, punishable by a fine of not less than fifty dollars, and if the fine is not paid, by imprisonment for not less than thirty days in the penitentiary or county jail, or until the fine shall be paid. Section 4 declares that the addition of water or any substance, other than is sufficient to preserve the milk while in transportation to market, is an adulteration. This statute is of general application throughout the State.

The board of health of the city of New York, February

23, 1876, enacted an ordinance, and made it a part of the sanitary code, as follows :

“No milk which has been watered, adulterated, reduced or changed in any respect by the addition of water or other substance, or by the removal of cream, shall be brought into, held, kept or offered for sale at any place in the city of New York, nor shall any one keep, have, or offer for sale any such milk.”

The authority to pass sanitary ordinances was conferred on the board of health of the city of New York by chapter 335 of the Laws of 1873, which created the present board. The eighty-second section requires the board to adapt the existing sanitary ordinances to the changes made by the act in the administration of the sanitary affairs of the city, and authorizes and empowers the board to add to the sanitary code, from time to time, additional provisions for the security of life and health in the city, and declares that any violation of the code shall be treated and punished as a misdemeanor, and that the offender shall also be liable to pay a penalty of fifty dollars, to be recovered in a civil action in the name of the mayor, aldermen and commonalty of the city.

The third count in the indictment, as appears upon its face, was drawn distinctly and exclusively with reference to the ordinance cited. The offence charged is precisely within its provisions, viz.: The bringing of adulterated milk into the city of New York for sale, and there offering it for sale. The eighty-second section of the act of 1873 does not prescribe the punishment for a violation of the sanitary code, except as it declares that it shall be punished as a misdemeanor. To ascertain the specific punishment for the offence reference must be had to the general statute (2 R. S., 697, § 40), which enacts, that “every person who shall be convicted of any misdemeanor, the punishment of which is not prescribed in this or some other statute, shall be punished by imprisonment in the county jail not exceeding one year, or by a fine not exceeding \$250, or by both such fine and imprisonment.” The joinder of several distinct misdemeanors in the same indictment is not a cause for the reversal of the judgment on writ of error when the sentence is single, and is appropriate to either of the counts

upon which the conviction was had. (*Kane v. People*, 8 Wend., 203; *People v. Rynders*, 12 id., 425; *People v. Costello*, 1 Denio, 83; *People v. Baker*, 3 Hill, 159; *People v. Liscomb*, 60 N. Y., 559.) The court in this case, in awarding judgment, could have proceeded upon the count based upon the statute of 1862, in which case sentence of imprisonment could not be imposed except in the alternative for the non-payment of the fine. But sentence of fine and imprisonment was imposed under the third count for a violation of the ordinance, on the assumption that the offence described thereon was a misdemeanor for which no punishment was prescribed, except by the provision of the Revised Statutes, to which we have referred. If this assumption was well founded there is no legal objection to the sentence and judgment, unless the ordinance was invalid or the count was defective in substance.

That the legislature in the exercise of its constitutional authority may lawfully confer on boards of health the power to enact sanitary ordinances, having the force of law within the districts over which their jurisdiction extends, is not an open question. This power has been repeatedly recognized and affirmed. (*Metropolitan Board of Health v. Heister*, 37 N. Y., 661; *Health Department v. Adam Knoll*, 70 id., 530; *The People ex rel. Cox v. The Justices of Sessions*, 7 Hun, 214.) And ordinances designed to prevent the sale of adulterated milk are manifestly within the scope of sanitary regulations.

But it is insisted by the counsel for the defendant that the offence charged in the third count in the indictment is the same offence provided for by the statute of 1862, and that the State having acted upon the subject, and defined the crime and punishment for the offence charged in this count, no greater punishment can be inflicted than is authorized by that statute. If the premise upon which the proposition proceeds is true, the conclusion claimed could not be resisted, for two reasons: First. The punishment provided by the statute of 1862, in the absence of any evidence of intention to exempt the city of New York from the operation of the act, must be regarded as the complete expression of the legislative will as to the extent of the punishment

to be awarded for the offence described therein wherever committed ; and, Second. If the board of health could, under its general power to enact sanitary ordinances, pass an ordinance prohibiting the same act which was already prohibited by the statute, and an indictment would lie either for a violation of the ordinance or of the statute, a conviction under the ordinance would be a conviction for an offence, the punishment of which is prescribed by some other statute than the general statute for the punishment of misdemeanors, and the statute of 1862 would govern as to the punishment.

But the difficulty with the argument addressed to us upon the point is, that it proceeds upon a false conception. The third count charges an offence not embraced in the statute of 1862, but which is embraced in the ordinance, viz.: bringing adulterated milk into the city of New York for sale. The statute relates only to *selling or exposing* impure or adulterated milk for sale. The ordinance may be violated, and the offence of bringing into the city impure or adulterated milk for sale may be complete, without either selling or exposing it for sale. Proof of an actual sale, or of an offer to sell, would be cogent evidence of the purpose for which it was brought to the city, but it is not the only competent, nor indeed would it ordinarily be the only available proof to establish the intent. The question comes to this, was the act of 1862 intended to cover the whole subject of the traffic in adulterated milk and did the Legislature intend to define by the act the only offences connected with the subject, which were the appropriate subjects of legislation? The Legislature could have made additional provisions to meet the devices resorted to, to defraud and injure the public in the traffic in milk, and to prevent an evasion of the law; and, when in 1873, long after the passage of the law of 1862, it conferred upon the board of health general power to enact sanitary ordinances, we think it conferred the power to make additional regulations to those contained in the statute of 1862, for the more complete protection of the people of New York against the introduction of impure and adulterated milk into the city.

It is urged that it is incongruous that while, under the

statute, a person who sells impure milk can be punished by fine only, he can, under the ordinance for bringing it into the city for sale, although no sale is made, be both fined and imprisoned. The inequality in the punishment in the two cases, if conceded, does not affect the question here considered. We have only to determine whether the legislature has conferred upon the board of health the power to pass the ordinance. But it may well be, that if the legislature was dealing directly with the subject, it might be considered that the offence of bringing impure milk into the city for sale, by producers or large dealers, deserved severer punishment than the sale of it by the small dealers, to whom they furnished it.

It remains to consider the objection of duplicity in the third count. It is urged that it unites the offence of bringing impure milk into the city for sale with the charge of offering it for sale; the one being a violation of the ordinance, and the other a violation of the statute—offences requiring different punishments. There is some question whether the objection of duplicity is fatal, either on motion in arrest of judgment or on writ of error. In *The People v. Wright* (9 Wend., 196), this is one of the grounds upon which the judgment in that case was arrested; but the point whether duplicity was a good ground for arresting the judgment was not particularly considered; and the consideration of it was not, perhaps, necessary to the disposition of the case, as all the counts were held to be defective in substance. In *Dawson v. The People* (25 N. Y., 399), SELDEN, J., remarks, that the objection of duplicity is probably fatal in arrest of judgment, or on writ of error. The general current of authority, and the expressions of text writers, are the other way. (*Commonwealth v. Truck*, 20 Pick., 356; Wharton's Crim. Law, § 395, and cases cited; Bishop's Crim. Pro., § 443.) But it is not necessary to decide this point, for we are of opinion that the objection of duplicity is not well taken. The third count purports to proceed exclusively upon the ordinance, and would not justify a conviction under the statute, although it contains averments which might sustain a count for the statutory offence. The allegation of the offering of the milk for sale

may be rejected as surplusage, leaving the conviction to stand upon the charge of bringing it into the city for sale.

We think the conviction should be affirmed.

CHURCH, Ch. J., FOLGER and EARL, JJ., concur; ALLEN and RAPALLO, JJ., dissent; MILLER, J., did not vote.

Judgment affirmed.

NOTE.—The Revised Statutes in regard to the punishment of misdemeanors, when not fixed by statute, has been changed by section fifteen of the Penal Code. That section reads as follows :

"§ 15. A person convicted of a crime declared to be a misdemeanor, for which no other punishment is specially prescribed by this Code, or by any other statutory provision in force at the time of the conviction and sentence, is punishable by imprisonment in a penitentiary or county jail, for not more than one year, or by a fine of not more than five hundred dollars, or by both." Ed.

SUPREME COURT OF THE UNITED STATES.

1877.

UNITED STATES v. FOX.

The judges of the Circuit Court of the United States for the Southern District of New York, certified their division of opinion in this case.

The defendant was indicted in the Circuit Court for the Southern District of New York, for an alleged offence against the United States, described in the ninth subdivision of section 5182 of the Revised Statutes. All of that statute applicable to this case reads as follows: "every person respecting whom proceedings in bankruptcy are commenced, either upon his own petition or that of a creditor," who, within three months before their commencement, "under the false color and pretence of carrying on business, and dealing in the ordinary course of trade, obtains on credit from any person any goods or chattels with intent to defraud," shall be punished by imprisonment for a period not exceeding three years.

The indictment charged the defendant with having, within three months previous to the commencement of his proceedings in bankruptcy, purchased and obtained on credit goods from several merchants in the city of New York, upon the pretence and representation of carrying on business and dealing in the ordinary course of trade as a manufacturer of clothing; whereas he was not carrying on business in the ordinary course of trade as such manufacturer, but was selling goods to some parties by the piece for

cost, and to other parties at auction for less than cost, and that these pretences and representations were made to defraud the parties from whom the goods were purchased.

Upon the trial the defendant was convicted, and on motion in arrest of judgment, the Court were opposed in opinion and they certified the question upon which they differed as follows :—“ If a person shall engage in a transaction which, at the time of its occurrence, is not a violation of any law of the United States, to wit, the obtaining goods upon credit by false pretences, and if, subsequently thereto, proceedings in bankruptcy shall be commenced respecting him, is it within the constitutional limits of congressional legislation to subject him to punishment for such transaction considered in connection with the proceedings in bankruptcy ?”

Held, that an act which is not an offence at the time it is committed cannot become such by any subsequent independent act of the party with which it has no connection. The criminal intent essential to the commission of a public offence must exist when the act complained of is done : it cannot be imputed to a party from a subsequent independent transaction.

Held, that the act described in the ninth subdivision of section 5132 of the Revised Statutes is one which concerns only the State in which it is committed : it does not concern the United States.

Held, that the answer to the question certified must be in the negative.

Mr. Assistant Attorney-General Smith, for the United States.

Mr. B. F. Tracey, for the accused.

Mr. Justice FIELD delivered the opinion of the court.

The question presented by the certificate of division does not appear to us difficult of solution. Upon principle, an act which is not an offence at the time it is committed cannot become such by any subsequent independent act of the party with which it has no connection.

By the clause in question, the obtaining of goods on credit upon false pretences is made an offence against the United States, upon the happening of a subsequent event, not perhaps in the contemplation of the party, and which may be brought about, against his will, by the agency of another. The criminal intent essential to the commission of a public offence must exist when the act complained of is done ; it cannot be imputed to a party from a subsequent independent transaction. There are cases, it is true, where a series of acts are necessary to constitute an offence, one act being auxiliary to another in carrying out the criminal design. But the present is not a case of that kind. Here an act

which may have no relation to proceedings in bankruptcy becomes criminal, according as such proceeding may or may not be subsequently taken, either by the party or by another.

There is no doubt of the competency of Congress to provide, by suitable penalties, for the enforcement of all legislation necessary or proper to the execution of powers with which it is intrusted. And as it is authorized "to establish uniform laws on the subject of bankruptcies throughout the United States," it may embrace within its legislation whatever may be deemed important to a complete and effective bankrupt system. The object of such a system is to secure a ratable distribution of the bankrupt's estate among his creditors, when he is unable to discharge his obligations in full, and at the same time to relieve the honest debtor from legal proceedings for his debts, upon a surrender of his property. The distribution of the property is the principal object to be attained. The discharge of the debtor is merely incidental, and is granted only where his conduct has been free from fraud in the creation of his indebtedness or the disposition of his property. To legislate for the prevention of frauds in either of these particulars, when committed in contemplation of bankruptcy, would seem to be within the competency of Congress. Any act committed with a view of evading the legislation of Congress passed in the execution of any of its powers, or of fraudulently securing the benefit of such legislation, may properly be made an offence against the United States. But an act committed within a State, whether for a good or a bad purpose, or whether with an honest or a criminal intent, cannot be made an offence against the United States, unless it have some relation to the execution of a power of Congress, or to some matter within the jurisdiction of the United States. An act not having any such relation is one in respect to which the State can alone legislate.

The act described in the ninth subdivision of sect. 5132 of the Revised Statutes is one which concerns only the State in which it is committed; it does not concern the United States. It is quite possible that the framers of the statute intended to apply only to acts committed in contemplation

of bankruptcy; but it does not say so, and we cannot supply qualifications which the legislature has failed to express.

Our answer to the question certified must be in the negative; and it will be so returned to the Circuit Court.

COURT OF APPEALS.

NEW YORK, 1878.

GREENFIELD v. THE PEOPLE.

The accused was indicted, tried and convicted for the crime of murder in the first degree, before the Court of Oyer and Terminer in and for the county of Oswego. The General Term of the Supreme Court, in the fourth judicial department sustained the judgment and the accused brought error.

This case is decided upon the questions arising out of the overruling of the trial court of the plaintiff's challenges to two of the persons who were sworn as jurors and found him guilty. One of them was challenged for principal cause and both for favor.

Held, that there has always been, and there is yet, notwithstanding modern legislation, a distinction between the two kinds of challenge. If one has expressed an opinion on the prisoner's guilt, it is a good ground of challenge for principal cause. If he had formed an opinion, upon reports and what he had read, of the prisoner's guilt or innocence of the accused, which it would need testimony to remove, he was disqualified — not being indifferent and impartial.

Held, that as the court is now the trier of the challenge for principal cause, as well as the challenge for favor, and the latter immediately succeeds the other, the appellate court may consider all that has been said by the person proposed as a juror, on his examination on both challenges, or on either of them.

Betts was challenged for principal cause, as having formed and expressed an opinion, and for favor, as not being indifferent and impartial.

This juror said he had read in a local newspaper a part of the testimony given for the people on the former trial of the accused; had heard others talk about that trial, a good deal; he had never expressed an opinion but had formed an impression, as to the guilt or innocence of the accused, from what he had heard and read as to it, and it would take evidence to remove such impression. He said that he thought that his previously formed opinion or impression would not bias or influence his verdict at all, and that he could take the case and decide it fairly according to the testimony without reference at all to any opinion he might have had. He further said that his opinion or impression was formed, on a supposition that the evi-

dence which he had read was true, and if sworn as a juror he would enter upon the trial with an impression as to the guilt or innocence of the accused, and that at that present time he had an opinion as to his guilt, and that he supposed that he had an opinion against him as to his character, as a man. He also said that the opinion or impression was formed by him on reading the testimony in the newspaper, that he still entertained the same, and had never had cause to change, nor to doubt the truth of it.

Jennings, the other juror was challenged for favor, as not being impartial or indifferent between the People and the prisoner. He had formed an impression as to the guilt of the prisoner from reading parts of the published testimony, and from the talk of people, which he thought he had expressed, which impression he still had; but he thought he could remove it, and would do it, and would be sure to, if he was sworn as a juror; that he thought he could render a verdict without being influenced by any impression or opinion that he might have had, and that it would not bias or influence his verdict, and, that he verily believed that he could render an impartial verdict according to the evidence, notwithstanding any impression or opinion he might have formed.

Held, that the word "impression" as used in this case by these jurors, conveys the idea that these persons had more than a doubt. There had been an effect produced upon their minds, which remained, and which was so firmly lodged there that it needed a newcoming force to dislodge it. They had received it into their minds as true that the prisoner was guilty, without certain knowledge of it, but upon proofs which they held satisfactory.

Held, that it matters not what the state of mind thus produced is christened, whether an opinion or an impression, for the conclusions of these jurors, as to the guilt of the accused, is equivalent to what the books call an opinion.

Held, that the accused was tried and found guilty of murder in the first degree, by a jury, two of whom had formed, and one of them had expressed an impression that he was guilty, which impression each of the two still had, when he went into the jury-box; an impression so strong, as that in the case of one of them, it would need testimony to remove it, and in the case of the other, it did not affirmatively appear, that it would not, and it was clearly to be inferred that it would.

Held, that on the other hand, the jurors who were challenged, each professed a purpose to render a fair and impartial verdict upon the evidence, and each stated his belief to be that he could and would do so.

Held, that the Laws of 1873, provides that all challenges of jurors shall be tried and be determined by the court only; and that, either party may except to the determination, and upon writ of error or certiorari the court may review it, the same as other questions arising upon the trial. This gives power to the appellate court to review that determination both on questions of law and questions of fact.

Held, that in this case there is only the question of fact, whether the two persons proposed, or either, of them, had such a bias against the prisoner, as not to stand indifferent?

Held, that one who has formed an opinion from the reading or report, partial or complete, of the criminatory testimony, against a prisoner, on a former trial, however strong his belief and purpose that he will decide the case on the evidence to be adduced before him as a juror and will give an impartial

verdict thereon, unbiassed and uninfluenced by that impression, cannot be readily received as a juror indifferent towards the prisoner and wholly uncommitted. Therefore the challenge to the favor should have been sustained.

S. C. Huntington, for the accused.

J. J. Lamoree, for the people.

PER CURIAM. In the view which we take of this case, it will be sufficient, if we notice with any particularity the points of the plaintiff in error, based upon the overruling of his challenges to two of the persons who were sworn upon the panel of jurors by which he was tried and found guilty.

One of them was challenged for principal cause, and as having formed and expressed an opinion. Both were challenged for favor, and as not being indifferent and impartial.

There has always been a distinction between these two kinds of challenge; and there is yet, notwithstanding modern legislation on the subject. The challenge for principal cause, asserts that there are facts, from which the law will say, that the person proposed to sit as a juror, is not indifferent between the parties. If it is seen that a certain state of facts does exist the law does, *ipso facto*, declare that result. If one has expressed an opinion on the prisoner's guilt, it is a good ground for challenge for principal cause. (*The People v. Vermilyea*, 7 Cow., 108; *The People v. Allen*, 43 N. Y., 28.) Though he had not expressed an opinion, if he had formed one, upon reports and what he had read, which it would need testimony to remove, he was, by the old law, as a rule of law, disqualified. (*People v. Mather*, 4 Wend., 229.) Even though, if testimony should do away the circumstances on which the opinion was based, he would not believe the party guilty. (*Cancemi v. The People*, 16 N. Y., 501.)

It has been held, that what is said by one proposed, on his examination on a challenge for favor, may not be referred to, to determine the correctness of the holding by the trial court on the challenge for principal cause. (*Cancemi v. The People*, *supra*.) We do not find that the converse has ever been held. And where, as in this case, the court is the trier of the challenge for principal cause, and also of

the challenge for favor, and the latter immediately succeeds the other, we see no reason why, on the determination of the latter challenge, it should not consider all that has been said by the person proposed as a juror, on his examination on both challenges; nor why an appellate court, with power to review the holding on the latter challenge should not have the power also to consider all that the proposed juror had stated, on examination on either challenge.

We are now ready to learn, what the challenged persons stated on oath, of their state of mind as to the prisoner's guilt.

One of them, Betts by name, had read in a local newspaper a part of the account of a former trial of the plaintiff in error, on the same indictment, — that part only which gave evidence made for the prosecution; he had heard others talk about the trial, a good deal; he had never expressed an opinion, but had an impression, as to what he believed; an impression which he had formed, as to the guilt or innocence of the plaintiff in error, from what he had heard and read as to it; which impression had led him to that opinion as to his guilt, so that he had at the time of the impanelling of the jury such an impression, opinion or belief as to the guilt of the plaintiff in error, that would take evidence to remove. This juror said that he verily believed, that he could then render a fair and impartial verdict upon the evidence; that he meant by that that he would endeavor to weigh the testimony impartially and render a verdict accordingly, and that was all that he meant, but that he did not mean to take back, that he would enter upon the discharge of his duties as a juror with an impression as to the guilt of the plaintiff in error which it would require evidence to remove, but that he thought that his previously formed opinion or impression would not bias or influence his verdict at all, and that he could take the case and decide it fairly according to the testimony without reference at all to any opinion he might have had. He also said that his opinion or impression was formed, on a supposition that the evidence which he had read was true, and that if sworn as a juror he would enter upon the trial with an impression as to the guilt of the plaintiff in error, and that at the present time he had an opinion as to his guilt, and that he sup-

posed that he had an opinion against him as to his character, as a man. He also said that the opinion or impression was formed by him on reading the testimony in the newspaper; that he still entertained the same and had never had cause to change nor to doubt the truth of it. The challenges were overruled; and exception was taken thereto.

The other juror, was Jennings. He was challenged for favor as not being impartial or indifferent between the people and the prisoner. He too had formed an impression as to the guilt of the prisoner from reading parts of the published testimony, and from the talk of people, which he thought he had expressed, which impression he still had; but he thought that he could remove it, and would do it, and would be sure to if he was sworn as a juror; that he thought that he could render a verdict without being influenced by any impression or opinion that he might have had, and that it would not bias or influence his verdict, and that he verily believed that he could render an impartial verdict according to the evidence, notwithstanding any impression or opinion he might have formed.

The challenge to the favor was overruled, and exception was taken to the ruling. Jennings was then sworn, and acted as a juror upon the trial in the action.

It is well to determine here, just what weight is to be given to the word "*impression*" used by these persons, in describing their state of mind. They seek to distinguish it from an opinion. But one of them says that it was such an impression as would lead him to a belief or opinion of the guilt of the prisoner, and of that strength that it would take evidence to remove it, and that he made a slight distinction between an impression and an opinion. The other said that he styled his mental state more an impression than an opinion, but that he had an impression as to his guilt, and did not directly answer the question whether it would take testimony to remove it, saying that he would answer that, if he accepted the obligation of a juror. Now it has been held that only an impression of guilt, if nothing which deserves to be called an absolute opinion, will not sustain a challenge for principal cause, where the juror sometimes had doubts as to guilt, and as far as any opinion had been formed, it was contingent and hypothetical. (*Freeman v. The*

People, 4 Denio, 9.) But it is clear, that the jurors in this case, had more than a doubt. There had been an effect produced on their minds, which remained, and which was so firmly lodged there that it needed a newcoming force to dislodge it. They had received it into their minds as true that the prisoner was guilty without certain knowledge of it, but upon proofs which they held satisfactory. And it matters not what the state of mind thus produced is christened, whether an opinion or an impression. There was existing such a decision of mind as to his guilt, as that further proofs must be produced, before that decision would be changed. So, that we are justified in treating the conclusions of these jurors, as to the guilt of the plaintiff in error, as equivalent to what the books call an opinion, when treating of this subject. The late Supreme Court did, indeed, hold, that on the trial of a challenge for principal cause, counsel could not put the question whether the proposed juror had an *impression* as to the guilt or innocence of the prisoner; but it was upon the ground that the word, abstractly, generally means something which does not amount to a fixed or settled opinion. (*People v. Honeyman*, 3 Denio, 121.) But here it is the proposed juror who uses the word, but uses it not in accord with that case, and when he gives a statement of the condition of mind which he calls an impression, it appears that it is a fixed and settled state of it, which will need force of proof to remove. There is the same distinction between this case, and that of *The People v. Thompson* (41 N. Y., 1), and that of *O'Brien v. The People* (36 N. Y., 276).

It thus appears, that the plaintiff in error was tried and found guilty of murder in the first degree, by a jury, two of whom had formed, and one of whom had expressed such an impression that he was guilty, which impression each of the two still had, when he went into the jury box; an impression so strong, as that in the case of one of them it would need testimony to remove it, and in the case of the other, it did not affirmatively appear, that it would not, and it was clearly to be inferred that it would.

On the other hand, the jurors who were challenged, each professed a purpose to render a fair and impartial verdict

upon the evidence, and each stated his belief to be that he could and would do so.

The fact that each of these two jurors started upon the trial of the plaintiff with an impression against him is sure. It is a matter of that kind, which, though resting in unseen mental operations, is still capable of positive ascertainment. Impression or no impression, is a matter which can be determined as positively as any other of mental cognizance. When these persons stated that they had an impression that the plaintiff was guilty of the crime with which he was charged, they spoke of a matter which existed to their consciousness as plainly as any other operation of the mind of which they took note. But when they stated that they would hear the evidence impartially, and would render a verdict without being affected by that impression, it is clear that they were not speaking of an ascertained fact, but only of a purpose of mind, the carrying out of which depended very much upon the strength of will and general mental capacity of each of them. It was a matter entirely uncertain and problematical which might or might not be attained. It is said in *People v. Mather (supra)*, that too much stress is not to be laid on such a declaration of a juror; inasmuch as the disqualifying bias which the law regards, is one which operates unconsciously on the juror, and leads him to indulge his own feelings when he thinks he is influenced entirely by the weight of the evidence; and that if he is sincerely determined to discard his prejudices he is not to be received, because the law does not hold him capable of doing so. (*S. P., Freeman v. The People*, 4 Denio, 9.) This, however, seems somewhat conflicted with by the ruling in *Lohman v. The People* (1 N. Y., 379), where it was held a proper question to put to a juror: If he were sworn upon the jury would he disregard what he had heard and read out of court, and render his verdict upon the evidence? The opinion of the juror was held relevant, competent, and primary evidence, entitled to a consideration, though by no means conclusive. But this again, is affected by the decision in *Cancemi v. The People* (16 N. Y., 501), where a juror was challenged for principal cause, and said that he had formed and expressed an opinion, that he had no fixed opinion, none which could not be

removed by the evidence. It was held there that the statement of the juror was to be taken as equivalent to saying that he had formed and expressed no opinion so fixed that it might not be controlled by the evidence; but it was also held, that he was clearly disqualified, because his mind was pre-occupied with an opinion which it would require evidence to remove.

It is clear, that had the law, as it is to be deduced from these adjudications, remained unchanged, the judgment brought up by the writ of error must have been reversed.

But the Legislature has interposed by statute. It has enacted (Laws of 1872, chap. 475, p. 1133); that the previous formation or expression and the present holding of an opinion or impression, in reference to the guilt or innocence of a prisoner, shall not be sufficient ground of challenge for principal cause; if the challenged juror declares on oath that he verily believes that he can render an impartial verdict according to the evidence, and that such previously formed or expressed opinion or impression will not bias or influence his verdict; and if the court is satisfied that such person does not have such a present opinion as will influence his verdict. This act has been judicially declared constitutional. (*Stokes v. The People*, 53 N. Y., 164.)

The two jurors did declare, on oath, that which the act calls for, and the trial court was satisfied that the opinion then held by them would not influence their verdict.

It may be that this would be final and conclusive upon the plaintiff in error, but for a later statute (Laws of 1873, chap. 427, p. 681); that all challenges of jurors shall be tried and determined by the court only; and that either party may except to the determination, and upon writ of error or certiorari the court may review it, the same as other questions arising upon the trial.

Formerly a finding of triers upon a challenge for favor was final and not the subject of review. (*Sanchez v. The People*, 22 N. Y., 147.) And this was so when the court was substituted for other triers by consent of parties. (*Id.*) But now an appellate court has the power to pass upon the question involved in a challenge, so as to decide whether the trial court, acting as triers, committed error in

its determination thereon. (*Thomas v. The People*, 67 N. Y., 218.) And the appellate court can review that determination both on questions of law and questions of fact.

There does not appear to be any question of law involved in the present inquiry. There was no exception pressed upon us, which was taken to the admission or rejection of evidence. The effect of the statute of 1872, in such a state of facts as this case shows, is, that the fact of forming or expressing an opinion or impression, or of having either at the time of the challenge, is not, as matter of law, conclusive proof of bias and unindifference. So that there is here, only the question of fact, whether the two persons proposed, or either of them, had such a bias against the prisoner, as not to stand indifferent. It is supposed that the judgment in the case of *Thomas v. The People* (67 N. Y., *supra*), is conclusive upon us upon that question. But there are important differences between that case and this; and we are not disposed to go further than we did there. There the opinion of the juror was hypothetical and contingent. It was dependent upon the truth of statements, upon the basis of which it had been formed. Those statements too were not statements made under oath, and spread before him in the shape of testimony from the witness-box; they were the unverified and unsolemnized talk of people. The impressions in the case before us are not hypothetical or contingent. Whether slight or deep, they were fixed and absolute. They were based too upon testimony absolutely given under oath, and with the care and attention produced by the solemnity and importance of a trial for murder. The testimony in that case (67 N. Y., *supra*), which fixed the homicidal act upon the accused person, was direct. Here it is circumstantial; and the same facts, which the mind of the proposed juror had once received as so weighty as to produce an impression of guilt, were to be again presented to it as the proof that the plaintiff in error was the killer; and we cannot exclude the idea that on a former trial of the plaintiff in error on this indictment, the jury had failed to agree on a verdict of guilty. It is therefore a case calling for great care that there be an absolutely indifferent jury to pass upon the circumstantial evidence that the prisoner was the slayer. It is true that in each case (this and that in 67 N. Y., *supra*),

the challenged person declares that it will need testimony to remove the opinion or impression. But in the one case, it is not certain that the talk of people will be reproduced in the evidence, and if it is not, the fact that it is not, is, in effect, the testimony which will be calculated to remove the impression. There is then a failure of testimony, which the juror must and will perceive, and which will affect his mind. In the other case, it is more than highly probable, it is as certain as any such human event not yet transpired, that the same testimony will be produced again. It has already been considered by the juror, and has satisfied his reason and produced belief, and can scarcely fail of doing so again. Each of the jurors, in the case before us, formed his impression from reading a report of the testimony given for the People. Entering the jury-box with that impression upon his mind, and having the same testimony again produced to him, before any in opposition is presented, that impression is too certainly to be deepened and fixed to be removed without difficulty. We are of the mind that one who has formed an opinion or impression from the reading or report, partial or complete, of the criminatory testimony against a prisoner on a former trial, however strong his belief and purpose that he will decide the case on the evidence to be adduced before him as a juror and will give an impartial verdict thereon, unbiased and uninfluenced by that impression, cannot be readily received as a juror indifferent toward the prisoner and wholly uncommitted. We have already given the views of judges upon this matter. How can it be determined or assumed that the mind, which has already yielded to the force of facts presented to it through the medium of sworn witnesses, and has formed an opinion thereon, will, on a second hearing of the same facts through a like medium, come to a different conclusion, or even so far command itself as to calmly and judicially weigh them again in the balance of a fresh and unbiased judgment? Can that mind be unbiased in the second proceeding of the same testimony, which has already caused it to preponderate and settle to or towards a conclusion? We think not. Therefore we are of the opinion that the challenge to the favor should have been sustained.

It does not need then that we consider the exceptions per-

sented to us, on the rejection and admission of questions to witnesses. We are not prepared to say, that with the discretion confided in a trial court on the cross-examination of witnesses, the Oyer and Terminer went beyond the due limits. At the same time it does seem to us that the district attorney was permitted to go to great lengths and fatiguing and exhausting particularity, repetition and ramification, in his cross-examination. And we would suggest that the ends of justice could be reached by a more concise sifting of the witnesses for the prisoner. We do not affirm or deny, however, that there was error in the rulings of the Oyer and Terminer on this head. It is sufficient that we see such error in the empanelling of the jury as calls for our interposition and for a new trial.

The judgment must be reversed and a new trial ordered.

All concur, except MILLER and EARL, JJ., absent.

Judgment reversed.

COURT OF APPEALS.

NEW YORK, 1878.

THE PEOPLE v. PETTIT.

The defendant was convicted before a justice of the peace, of being a disorderly person for neglecting to support his wife and children, under the Revised Statutes. The defendant gave recognizance with sufficient sureties, and the people claim that there was a breach of the condition of such recognizance. The statute declares that "the committing of any of the acts which constituted the person so bound, a disorderly person, shall be deemed a breach of the condition of such recognizance." The evidence in the case is, that the wife left her husband voluntarily in December, 1872, for the purpose of recruiting her health; that her husband was opposed to her leaving, and told her if she did go, not to return. These parties had been married several years, and had two children, one twelve years old, and the other an infant about a month old. They had resided most of the time in the house with the parents of the husband upon a large farm, but at the time of her leaving they were living in a hotel, a few rods distant, kept by the husband, but which was soon after rented, and the husband returned to reside with his father and mother. At the time of the execution of the recognizance they were living separate and apart. On the day the recognizance was executed, the husband offered to take the wife and children to

his father's home and support them there as they had been before supported, occupying a separate portion of the house. The recognizance was given March 6, 1873, and on the 25th of March the wife wrote to defendant as follows: "I want you to come immediately, or send some one with means to pay for my support, and the support of your little children from March sixth up to the present time, or I shall prosecute the bail bonds." The husband answered on the twenty-ninth: "I am, and at all times have been ready and willing to support you at home, but not while you are absent therefrom against my wishes and consent." The wife declined to go with her husband, or to allow him to take the children, and she gave as a reason, that she would not live in the house with his parents. She testified, "I declined to go to the house with his father and mother. I would not live in the family with them." She also testified, "I stated further in this conversation that it was not a suitable place because his father was intemperate, and very abusive; he abused every one in the house. I told him it was not a proper place to take me and the children. I don't remember that I did state anything why it was not proper."

Held, that this evidence was not sufficient to establish a breach of the recognizance. There was no pretence that the apartments were not comfortable, and the offered support proper and suitable. Nor was it claimed that the wife had been cruelly treated, or that her health or life was in danger from personal violence.

Held, that the husband has a right to select his own residence, and the support which this statute was intended to secure is, the necessities of life, or such as the parties have been accustomed to, and the husband is able to provide.

Held, that this summary statute was designed to enforce actual physical support only, not to interfere with marital relations, and when such support is tendered, the husband cannot be convicted in this *quasi* criminal proceeding for refusing or neglecting to furnish it.

Wm. C. Rugar, for the people.

A. L. Johnson, for the defendant.

CHURCH, Ch. J. This is an action upon a recognizance given by the defendant Pettit with sureties upon his conviction, before a justice of the peace, of being a disorderly person for neglecting to support his wife and children, under 1 R. S., 638. By section 3 of the act, it is declared that "the committing of any of the acts which constituted the person so bound, a disorderly person, shall be deemed a breach of the condition of such recognizance."

To maintain this action it was incumbent upon the plaintiff to establish that a breach had occurred, viz.: That subsequent to the giving of the bond, the defendant Pettit had been guilty of neglecting to support his wife and children. Upon a motion for a nonsuit, this point was distinctly made

and overruled, and an exception taken, and this presents the most serious question in the case.

At the time the motion for a nonsuit was made, the evidence consisted mainly of the testimony of the wife. She stated that she left her husband voluntarily in December, 1872, ostensibly for the purpose of recruiting her health, that her husband was opposed to her leaving, and told her if she did go, not to return. The parties had been married several years, and had two children, one twelve years old, and the other an infant about a month old. They had resided most of the time in the house with the parents of the husband on a large farm, but at the time of her leaving they were living in a hotel, a few rods distant, kept by the husband, but which was soon after rented, and the husband returned to reside with his father and mother. It is not claimed that the husband turned away from his wife, and I do not regard it material to inquire into their relative positions prior to the conviction. It appears that at the time of the execution of the bond they were living separate and apart, and it may be assumed that the correctness of the conviction cannot be attacked in this action upon the merits. But the conviction is not evidence of a subsequent breach of the condition of the recognizance. It is undisputed that on the day the recognizance was executed, the husband offered to take the wife and children to his father's house and support them there as they had before been supported, occupying a separate portion of the house, and a brief correspondence soon after corroborates the oral evidence. The bond was given March 6, 1873, and on the twenty-fifth of March the wife wrote to defendant as follows: "I want you to come immediately, or send some one with means to pay for my support, and the support of your little children from March sixth up to the present time, or I shall prosecute the bail bonds," to which he made the following answer, on the twenty-ninth, and delivered it to her in person: "I am, and at all times have been ready and willing to support you at home, but not while you are absent therefrom against my wishes and consent."

She declined to go with him, or to allow him to take the children, and the reason she gave was that she would not live in the house with his parents. She testified, "I de-

clined to go to the house with his father and mother. I would not live in the family with them." She further testified: "I stated further in this conversation that it was not a suitable place because his father was intemperate, and very abusive; he abused everybody in the house. I told him it was not a proper place to take me and the children. I don't remember that I did state anything why it was not proper."

This is the substance of the evidence given on the part of the prosecution to establish a breach of the recognizance, and it is manifest that it falls far short of being sufficient. There was no pretence in this evidence that the apartments were not comfortable, and the offered support proper and suitable. It appeared that the defendant was an only son; and the father, or mother owned the farm of 275 acres; that the house was large, and no other occupants but the parents and hired help, and that defendant had no other house, and was not worth any property of his own. Nor was it claimed before the motion for a nonsuit was made that the wife had been cruelly treated, or that her health or life was in danger from personal violence. The reason for declining, in effect, was, that the parents were disagreeable, and the father intemperate and abusive. I assume, what is fairly inferable from her evidence, that the residence in the same house with the parents was unpleasant, and we may assume further that they and the husband were at fault. But this does not establish that the husband refused or neglected to maintain his wife. The statute is not a substitute for an action of divorce; it was not designed to settle marital controversies nor to furnish relief for violations of marital obligations except in the single particular of requiring a support or maintenance. The statute is summary and highly penal, and must be strictly construed. The defendant is charged with neglecting to support his wife. Does he neglect, when he offers to support her, and no question is made of the good faith of the offer? As well might it be said that he neglected to support his wife if she had returned with him, because her surroundings were disagreeable. A husband cannot be made a vagrant and a disorderly person, and held amenable to this statute by not complying with any condition in respect to support which the wife may see fit to impose, nor is it proper to refer the reasonableness

of the conditions to the decision of a jury. She exacted in this instance a separate house. Why might she not a particular kind of a house in a particular neighborhood, or impose other conditions? The husband has a right to select his own residence, and the support which this statute was intended to secure, is the necessities of life, or such as the parties have been accustomed to and the husband is able to provide. The plaintiffs were bound at least to establish such a case as would entitle a third person to recover against the husband for necessities furnished the wife. The rule in such cases is that during cohabitation the assent of the husband is presumed, but if they are living apart the burden is upon the person furnishing the necessities to show that the circumstances are such as to render the husband liable. (11 J. R., 281; *Blowers v. Sturtevant*, 4 Den., 46; Bishop on Mar. & Div., §§ 569, 570; 3 Car. & P., 15.) The case stands as though the wife had voluntarily separated from the husband. Whatever force may be given to the conviction when the husband made the offer to support her, the question is, making the liability of the husband to a third person for necessities furnished, which is the most favorable view for the plaintiff, the test whether the wife was justified in refusing to return, or in other words whether she would have been justified in leaving her husband. Mr. Bishop, in his work before quoted, after reviewing the authorities, says: "The true view of this matter plainly is that when the wife is away without her husband's consent he is not to be charged with necessities furnished her, unless he has committed acts justifying a suit against him for divorce, either a divorce from the bond of matrimony, or from bed and board." In *Blowers v. Sturtevant* (4 Denio, 46), it was proved that the husband had used violence toward his wife on an occasion five months before their separation, and there had been other difficulties and quarrels, but when she left his house it was not from any apprehension of ill-treatment, but in order to make a visit, and she refused to return unless his relatives who lived with him would go away, and it was held that he was not liable for her board furnished by her father during such separation. BRONSON, J., in delivering the opinion, after properly disapproving of *Harwood v. Heffer* (3 Taunton, 421), where the husband brought

a profligate woman into the house and placed her at the head of the table, said: "But still when there is no such gross indecency on the part of the husband, all the cases agree that there must be just ground for apprehending personal violence before the wife can voluntarily go away and charge the husband with her support." At the time the motion for a nonsuit was made there was no evidence that the wife was in danger of personal injury, or that she apprehended any. The most that can be said is that the presence of the parents rendered her home unpleasant, and the habits of the father were objectionable. There is no authority for holding that these facts are sufficient to entitle the wife to a divorce or separation from bed and board, and the motion for a nonsuit should have been granted, and for this error a new trial must be awarded. It is proper to say that subsequently, in the course of the trial, the wife gave some additional testimony upon this point. She testified that she did not apprehend personal injury, and that she was afraid of her life. She specified one occasion when the father threatened to strike her with a chair, but she remained there five years afterwards, and it is clear that she did not leave, or remain away on that account. It is a noticeable feature of the evidence, that no charge of personal violence or threats, or even abuse is specified against the husband, nor that the husband was unable or unwilling to protect his wife from any apprehended violence, real or fancied of the father. She testified: "the true difficulty between he and I was not that I didn't like him, that he was disagreeable, that our tastes were not similar; I liked him when he behaved himself." It is not stated wherein he misbehaved. Although afraid of her life, she said she was willing to live with her husband separate from his parents, and as to the father she stated that when he was sober "the old gentleman and I got along well enough." There was an attempt to prove improper relations between the defendant and a hired girl, but it failed. It seems that at some period a girl who was a relative of the husband worked there, and all that was proved tending to show improper intimacy, was that they slept up stairs, and the old people below, but it does not appear that they occupied the same apartments, nor was there any evidence of any improper acts between

them. I do not think that all the evidence contained in the record would be sufficient to entitle the wife to a decree of divorce of any kind. There must be apprehension of personal violence, and it must be reasonable and substantial, and based upon sufficient facts to enable the court to see that it is well founded. In England the rule of liability under a similar statute seems to be more restricted than the test above indicated. In *Flanagan v. Overseers of the Poor* (8 Ellis & Black, 450), it was held that ill-usage sufficient to justify the wife in refusing to live with the husband was not sufficient to charge the husband under the statute, when he offered to take the wife home and support her. Lord CAMPBELL, C. J., assumed that the circumstances were sufficient to entitle the wife to a decree of separation and sufficient to enable her to pledge his credit for necessities, and yet inasmuch as he offered to support her, he could not under the statute be convicted of refusing, or neglecting to support her. He said: "But the magistrates appear to have supposed that because the wife might have reasonable ground for not going home to her husband, he was guilty of refusing to maintain her. Can he be said to have wilfully refused or neglected to maintain her? I think not, and I am of opinion that no past cruelty could justify the magistrates in coming to such a conclusion." WIGHTMAN, J., said: "This is clearly an attempt to enforce a separate maintenance in a case where the husband does not refuse to maintain his wife but is always ready to receive her. The magistrates consider that the wife on account of the apprehended ill-usage is not bound to go and live with the husband, but that is very different from a refusal by him to maintain her." If a wife has legal grounds for a divorce, that remedy affords ample opportunities to secure provision for support, and should be pursued. This summary statute was designed to enforce actual physical support only, not to interfere with marital relations, and when such support is tendered there is much force in the position that the husband cannot be convicted in this *quasi* criminal proceeding for refusing or neglecting to furnish it. There may be doubtless circumstances when the wife would be justified in refusing to go with her husband, and yet they would not be sufficient to entitle her to a divorce. The instances cited

by the learned judge in his charge supposing the husband offered to support his wife in a den of thieves or at a house of ill-fame, all would agree that not only would the wife be justified but it would be her duty to refuse to go to such a place, and such offer of support might not be a defence under the statute. If so, it would be upon the ground I apprehend that this would not constitute an offer of support at all within any recognized legal or moral rule. Such offers would be regarded as a fraudulent attempt to evade the requirement of the statute. They are very different from the offer of support made in this case, and to leave to a jury in such a case to determine whether it was reasonable to refuse to accept the support tendered, would greatly enlarge the purview of the statute, from what was intended, and would be as unwise and dangerous as it is unprecedented. Suppose the husband had committed adultery and the wife was entitled to an absolute divorce. She would have the right to remain away, and institute legal proceedings for a divorce in which she might obtain both temporary and permanent support, but if the husband offered to support her, would he be liable under this statute? I think not. It would follow that a reasonable excuse may exist for not going home with the husband on request, and yet he be not amenable to this statute. The law in such a case has provided a more appropriate remedy; but it is unnecessary to pass upon the question definitely. In this case, under the most favorable test, no breach was established.

The judgment must be reversed and a new trial granted; costs to abide the event.

All concur, except MILLER and EARL, JJ., absent.

Judgment reversed.

NOTE.—The Revised Statutes, under which the foregoing case arose, reads: "All persons who shall abandon or neglect to support their wives or children, or who threaten to run away and leave their wives or children a burthen on the public," "shall be deemed disorderly persons." "The justice may require of the offender sufficient sureties for his or her good behavior for the space of one year." "The committing any of the acts which constituted the

person so bound a disorderly person, shall be deemed a breach of the condition of such recognizance."

The Code of Criminal Procedure is now in force and describes the offence to be as follows :

"§ 899. The following are disorderly persons :

"1. Persons who actually abandon their wives or children, without adequate support, or leave them in danger of becoming a burden upon the public, or who neglect to provide for them according to their means ;

"2. Persons who threaten to run away and leave their wives or children a burden upon the public."

* * * * *

"§ 901. If the magistrate be satisfied, from the confession of the defendant, or by competent testimony, that he is a disorderly person, he may require that the person charged give security, by a written undertaking, with one or more sureties approved by the magistrate, to the following effect :

"1. If he be a person described in the first or second subdivision of section eight hundred and ninety-nine, that he will support his wife and children, and will indemnify the county, city, village or town against their becoming, within one year, chargeable upon the public ;

"2. In all other cases, that he will be of good behavior for the space of one year ;

"Or that the sureties will pay the sum mentioned in the undertaking, and which must be fixed by the magistrate."

"904. The undertaking mentioned in section nine hundred and one is forfeited by the commission of any of the acts which constitute the person by whom it was given a disorderly person, and in case of a person described in the seventh and eighth subdivisions of section eight hundred and ninety-nine, by his playing or betting, at one time or sitting, for money exceeding the value of two dollars and fifty cents."

Ed.

COURT OF APPEALS.

NEW YORK, 1878.

MAUKE V. THE PEOPLE.

The accused was indicted for murder, tried and convicted of murder in the first degree, at the Erie Oyer and Terminer, and sentenced to be hanged on the 21st day of June, 1878, between the hours of ten o'clock A.M. and two o'clock P.M. The accused obtained a writ of error to the General Term, in the fourth department, with a stay of proceedings upon the judgment. A bill of exceptions to the decisions of the trial court was settled, signed and sealed and filed with the clerk of the court. A return to the writ was made and certified to by the clerk which contained a transcript of the indictment, bill of exceptions, and sentence of the court. From the clerk's certificate it appeared that no record of the judgment on such conviction had been signed and filed. It appears from the bill of exceptions that certain exceptions to the decisions of the trial court were made, which might have been passed upon by the General Term, but that court did not pass upon them. The General Term considered the writ and return, and the matters contained therein, and determined to dismiss the writ of error on the ground that the return did not show any record of any final judgment of the Oyer and Terminer against the plaintiff in error. For that cause the writ was dismissed, and the proceedings were ordered remitted to the Oyer and Terminer of Erie County with directions to fix another day for the execution of the sentence against him. This action of the General Term is brought here for review.

Held, that a judgment of a General Term dismissing a writ of error without either affirming or reversing the judgment of the trial court, if there was no power to dismiss the writ, is a final judgment.

Held, that the General Term gave as its reason for dismissing the writ, that the return does not show any record of any final judgment of the Oyer and Terminer.

Held, that this statement is susceptible of two interpretations. One, that though there is a record returned, it does not appear that a final judgment was rendered. Another, that though there was a final judgment, it does not appear that a formal record thereof was made up and returned.

Held further, that whichever is the correct understanding of the order, the court erred.

Held, that it appears from the return, that the plaintiff in error was duly tried and convicted, by the verdict of a jury, of murder in the first degree; and the sentence of death by hanging, on a day certain, between two hours of that day, was passed upon him by the court of Oyer and Terminer, in which he was tried. This was a final judgment. The sentence given by the court is the judgment rendered by it.

Held, that the return in this case, was made in compliance with the statutory provisions, and it was error to dismiss the writ without looking into the bill of exceptions, or other matter in the return to ascertain if errors ex-

isted. The plaintiff in error had procured a return to his writ, which contained all of which the statute required the clerk to make return. By a dismissal of it and a remitting of the proceedings, with directions to fix another day for the execution of the sentence, the plaintiff in error lost the benefit of his writ. The sentence of the Oyer and Terminer, was the judgment of the court which the writ of error brought up for review.

Held, that the General Term was not confined to the matter returned to the writ of error. It might, on motion of the district attorney, or of the plaintiff in error, or at its own suggestion, have directed a writ of *certiorari* to bring before it whatever there was of record in the case, not contained in the return to the writ of error.

Held, that one tried on an indictment, and convicted by the verdict of a jury, and sentenced by the court, may obtain and file a bill of exceptions and sue out a writ of error. On a return of the clerk thereto, made in accordance with the statute, he may move the court to review the errors alleged by him. If they, or any of them, are such as that the matter contained in the return will necessarily show them, the writ of error may not be dismissed, for the reason that the return does not present a complete and formal record of the judgment and proceedings of the trial court. Such as it does present, the matter for determining must be passed upon. But if errors are alleged to the court, which may or may not have occurred, and they not be shown by the matter in the return, the court may entertain a motion by the defendants in error, or plaintiff in error, or of its own motion direct, that a writ of *certiorari* issue to the trial court, so that all may be brought up which the records of that court contain, relating to the case. And it matters not whether the record or roll thereof has been made up before or after the writ of error sued out by the plaintiff in error, or before the writ of *certiorari* is directed, or after that. Whatever took place in the trial court which was matter proper for record, may as well after as before be incorporated in a roll and returned.

A. G. Rice, for the plaintiff in error.

R. C. Titus, district attorney of Erie county, for the people.

FOLGER, J. Charles Mauke was tried at the Erie Oyer and Terminer on an indictment of murder. He was convicted by the verdict of the jury of murder in the first degree. He was sentenced by the court to be hanged on the 21st day of June, 1878, between the hours of ten o'clock A.M. and two o'clock P.M. He sued out a writ of error to the General Term, in the fourth department. In the allowance of the writ there was embodied an express direction that it operate as a stay of proceedings upon the judgment; (2 R.S., p. 748, §§ 16, 20). A bill of exceptions to the decisions of the court on the trial was settled, signed and sealed, and was filed

with the clerk of the court; (2 R. S., p. 736, § 21). The clerk made a return to the writ of error, which return contained a transcript of the indictment, bill of exceptions and sentence of the court, and was certified by the clerk; (2 R. S., p. 740, § 20). It appeared from that certificate that no record of the judgment on such conviction had been signed and filed; (id., p. 739, § 10).

At the General Term, the writ of error and the return were read. Counsel for the plaintiff in error was heard; but it does not appear what points were made by him, nor what errors were alleged to have been committed by the Oyer and Terminer; but it does appear from the bill of exceptions that certain exceptions to the decisions of that court were made on the trial, which might have been passed upon by the General Term. It does not appear from the record before us that that learned court did so pass upon them. What does appear is, that the writ of error and return, and the matters and things therein contained, were considered, and that the court determined to dismiss the writ of error, on the ground that the return did not show any record of any final judgment of the Oyer and Terminer against the plaintiff in error. The writ of error was dismissed for that cause, and the proceedings were ordered remitted to the Oyer and Terminer, with directions to fix another day for the execution of the sentence against him. By writ of error out of this court this action of the General Term is brought here for review.

The learned district attorney makes as preliminary points; that the judgment of the General Term is not final; and that this court cannot review aught but a final judgment. The last proposition is correct. But a majority of this court are clear that a judgment of a General Term dismissing a writ of error without either affirming or reversing the judgment of the trial court, if there was no power to dismiss the writ, is a final judgment; and they think that *The People v. Stearns* (23 Wend., 634), and *Pratt v. The People* (67 N. Y., 606), are not in point. For my own part, I doubt the correctness of that conclusion; but inasmuch as it is so settled by the court, I proceed to consider the other questions arising in the case.

There has not been uniformity of decision in the courts,

upon the effect of the provisions of the Revised Statutes prescribing for bills of exceptions, and writs of error, and the return thereto in criminal cases. Those provisions are contained in chapter 2, part 4 of the Revised Statutes, under the general title of "*proceedings in criminal cases.*"

The first case which we find is "*The People v. Gray* (25 Wend., 465), decided in 1841. Gray was indicted as an accessory before the fact to a burglary. The return to the writ of error there set forth two indictments, what purported to be the minutes of the trial, the motion to proceed to trial, the appearance of the prisoner, the impanelling of the jury, their verdict of guilty, the sentence of the court, and the bill of exceptions. Three points were taken in the Supreme Court by the counsel for Gray, two of which were—that it not appearing from the proceedings returned that the prisoner was present in court when sentence was pronounced against him, the judgment should for that cause be reversed; and that the conviction of the principal was not duly proved. The court recognized the fact, that the return of the writ of error did not bring up the record of the judgment. It seems that it disposed of the first point above stated, on that ground; saying, that objections to errors in form, which might be corrected in making up the record, could not be entertained. It added, that the return of the clerk need contain no more than a copy of the indictment, bill of exceptions, and judgment of the court; and cited 2 Revised Statutes, 620 (meaning 740, probably), section 20. The court proceeded to review the alleged error, the facts as to which were presented by the bill of exceptions returned, and finding that the error existed, reversed the judgment. I do not find that this case has ever been disapproved in the books. I think that it decides two things; first: That a return of a clerk to a writ of error, which contains the three things named in the statute (section 20, *supra*), is a sufficient return and record for the appellate court to proceed upon, to review any alleged errors which would necessarily appear in the records set forth in the return; second: That the statutory provision for a return and its contents does not render obsolete the record of the judgment, and that if the plaintiff in error means to show error, which would not necessarily appear in the statutory return, he must have

a record of judgment made up and returned, which will show affirmatively or negatively that the error alleged has taken place by commission or omission.

In *Safford v. The People* (1 Park. Cr. R., 474), in 1854, the General Term of the fourth district, held that a writ of error and return to it, showing the bill of exceptions, and a transcript of the conviction and sentence, brought the case properly before the court; and it entertained and passed upon the point, that the return did not show that the plaintiff in error was asked before sentence was passed upon him what he had to say why judgment should not then be pronounced. Other points made upon the bill of exceptions were also passed upon and the judgment was reversed.

In *Thompson v. The People* (3 Park. Cr. Rep., 208), in 1856, the General Term of the sixth district followed the authority of 25 Wend. (*supra*), refused to pass upon the point made that the return did not show that the prisoner was asked what he had to say why sentence should not be passed upon him, putting its refusal on the ground that there was no record before it on which such error could be alleged; but did pass upon points made upon the frame of the indictment and affirmed the judgment. In that case no bill of exception was made, and the return to the writ of error contained only the indictment and the clerk's minutes of trial, showing the impanelling of the jury, the verdict of guilty and the sentence of the court.

In *Dawson v. The People* (5 Park. Cr. Rep., 118), in 1860, the return showed an extract from the clerk's minutes, from which it appeared that the prisoner was arraigned and pleaded not guilty; another extract by which it appeared that he was tried and found guilty; also an extract stating that he was sentenced; but it was also certified by the clerk that the last extract was a memorandum written with pencil on a loose piece of paper and the paper pinned to one of the leaves of the book of minutes. There was no bill of exceptions. No record of judgment was returned or made up, and the indictment could not be found. The writ of error was quashed. The court declared that the loose memorandum was not a part of a record, and held that the return did not disclose the fact of any judgment or sentence. This was enough to call for quashing the writ, for the return

did not contain any part of what the Revised Statutes required. But the court went further, and said that the prisoner could not review the proceedings upon his trial until a record had been made up, and cited section 4, article 1, title 6, chapter 2, part 4 Revised Statutes (2 R. S., 738-9).

In *Phillips v. The People* (57 Barb., 353), in 1869, the General Term of the fourth district held that it was no objection to the hearing of a case upon the writ of error that there was no return of a record of the judgment; and that it was enough if the return set forth the indictment, the trial, the exceptions, verdict of the jury and the judgment of the court; adding, however, that all that was complained of was fully before the court for review.

In *Graham v. The People* (63 Barb., 468), in 1872; S. C., on motion to dismiss writ of error (6 Lansing, 149), in 1871; the General Term of the fourth department held that the Revised Statutes had not abolished the common law record to criminal cases, citing 2 Revised Statutes, 738, section 4; 739, section 10; but that the statutes did not require that the record, in the first instance, be filed, or that the return to a writ of error contain it. The return in that case contained the indictment, the plea, a continuance, bill of exceptions, record of conviction or copy of minutes of clerk, and failed to show that the prisoner had been asked why sentence should not be passed upon him. He made the point that for that reason the judgment should be reversed. The court refused to quash the writ, and directed that a writ of *certiorari* issue to bring up such proceedings in the case as might remain in the Court of Oyer and Terminer or among its records. On the return to the writ of *certiorari*, the court, for reasons given, regarded the return to the writ of error the one relied upon, and proceeded to review the errors alleged, and reversed the judgment, holding as one ground of error, that it did not appear that the prisoner was asked before sentence what he had to say why sentence should not be pronounced.

In *Dent v. The People* (46 How. Pr. R., 264), in 1873, at the General Term of the first department, the return showed the indictment, the testimony, the charge of the court, the verdict and the sentence. No record appeared to

have been made up, none was returned. The same point was made as in *Thompson's Case* (*supra*), and in *Graham's Case* (*supra*). The court affirmed the judgment, saying in substance, that if the plaintiff in error wished to raise that point, he should have had a judgment record made up which would show the proceedings on the trial.

In *Hildebrand v. The People* (1 Hun, 19), in 1874, in the General Term of the first department is an elaborate discussion of the subject. The same point was made there as that first noticed. The court refused to entertain it, on the ground that to review the conviction and judgment in criminal cases, a formal judgment record is required; and that the omission alleged went to the correctness of the judgment and not to that of the conviction. It affirmed the judgment.

In *The People ex rel. v. Woodin*, in 1876, in the General Term of the fourth department, the return to the writ of error contained the indictment, bill of exceptions, and judgment of the court, certified by its clerk. The court followed the decision in *Hildebrand's Case* (*supra*); and dismissed the suit.

It thus appears that there has been marked diversity of judgment upon the question involved, and where there has been the same conclusion reached on the primary question, there has been diversity of subsequent action. In some cases the writ has been quashed; in some the judgment has been affirmed; in some a particular ground of error alleged has been ignored, and the judgment reviewed upon other allegations of error.

It is, therefore, of some importance that this court of last resort consider the matter, and if it may be so, determine what is the true construction and effect of the provisions of the Revised Statutes, and what should be the course of action of the General Term, when upon a writ of error a return is made in accordance with those statutes, but which does not contain the matter of record which will enable those courts intelligently or satisfactorily to pass upon all the allegations of error presented at the hearing on the return.

So far as citations have been made to us, and so far as we have made search, it does not appear that the question has ever been passed upon in this court. *Weed v. The People*

(31 N. Y., 465), in 1865, is relied upon. There the plaintiff in error was convicted of perjury. The return to the writ of error showed the indictment, the arraignment and plea of the prisoner, the formation of the Oyer and Terminer, the impanelling of a jury, their verdict of guilty, a demand to the prisoner why judgment should not be proceeded to, and the judgment. The record was signed by the district attorney. There was in the record the use of the word justice in the singular number to designate the court, instead of the plural or other designation. The court reversed the judgment of the General Term, which had affirmed the judgment of the Oyer and Terminer on the conviction. Two opinions were given. One by Davies, J., for affirmance. One by Davis, J., for a dismissal of the writ. The latter, reasons that the words "said justice" and the like in the record returned, can refer only to the last previously named justice, who, on reference to his name and addition, appears to have been a justice of the sessions only, and not empowered to hold a court of Oyer and Terminer alone, and to pronounce judgment upon a conviction for perjury, and that the record, if it be one, shows such want of power to give the judgment as to lead to a reversal of it; but that the paper brought up is not a judgment record, for it is signed by one styling himself district attorney; whereas, says the opinion, it should have been signed by a judge of the court. This has, since the trial in that case, been changed. (See Laws of 1847, chapter 280.) The opinion seems to hold that there should be a common law record; but it is not distinctly so stated. It concludes by recommending a reversal of the judgment of the General Term and an order to it to dismiss the writ of error, for the want of any proper judgment record upon which it could properly act. But as seen, this court confined itself to a reversal of the judgment of the General term. We cannot say, that that case is an authority for the position, that a writ of error in a criminal case, to receive the attention of an appellate court, must bring up a formal common-law record of the judgment of the trial court.

In *Messner v. The People* (45 N. Y., 1), this question might have been raised and considered, but it was not. The points made, though there was no common law record of

the judgment, were noticed, and some of them sustained and the judgment reversed.

We are not informed of any other case in this court in which the question is involved.

We proceed to the examination of the case as presented in the error book, as one not fully determined by authority.

We are of the opinion that the General Term erred in dismissing the writ of error. The cause for that action is given in the judgment of that court. It is, that the return does not show any record of any final judgment of the Oyer and Terminer. This statement is susceptible of two interpretations. One, that though there is a record returned, it does not appear that a final judgment was rendered. Another, that though there was a final judgment, it does not appear that a formal record thereof was made up and returned. Whichever is the correct understanding of the order, we think that the learned court erred.

First. It plainly appears from the return, that the plaintiff in error was duly tried and convicted, by the verdict of a jury, of murder in the first degree; and that sentence of death by hanging, on day certain, between two hours of that day, was passed upon him by the court of Oyer and Terminer, in which he was tried. This was a final judgment of that court. It put an end to the case in that court; and nothing remained to be done therein. The Oyer and Terminer passed sentence upon the convicted man; and in criminal cases, in the vocabulary of the common law, the sentence given by the court is the judgment rendered by it. (Bl'k Com. 4th book, p. 136. See also 25 Wend., *supra*; and *Safford v. The People, supra*.)

Second. The return made to the writ of error does show that the Oyer and Terminer passed that sentence, that it rendered that final judgment upon the case against the prisoner. Unless then, there is some requirement of law for a more formal record of that judgment than is contained in the error book, there was shown by that return a record of a final judgment.

Whatever may have been the need at common law of a formal and technical judgment record or roll, the provisions of the Revised Statutes have relaxed it. They prescribe for the making up of a record of the judgment, on the require-

ment of the person convicted or acquitted (2 R. S., 738, § 4); and for an entry of the judgment in the minutes of the court after inspection of the statement thereof by the court (id., §§ 5, 6); and that a copy of the minute of a conviction, with the sentence of the court thereon, and a copy of the indictment, when they are duly certified shall be evidence of the conviction, where it does appear that no record of the judgment has been signed and filed. (Id., 739, § 10.) It does appear in the case in hand that no record has been signed and filed. The Revised Statutes also prescribe for writs of error (2 R. S., 740, § 14, *et seq.*); and where the writ operates as a stay of proceedings (as does this one), for a return by the clerk thereto, specifying what he shall return, viz.: a transcript of the indictment, bill of exceptions, and judgment of the court, certified by him. (Id., § 20.) As we have seen, the sentence pronounced, is the judgment, of the court. The district attorney is required to bring on for argument the return to such writ, that is, that return so made by the clerk, and it is competent for the defendant to do the same (id., 741, § 21); and the court, say the statutes, shall proceed on the return thereto, and render judgment on the record before them. (Id., 741, § 23.) These provisions indicate the legislative intention to make the return called for by the twentieth section (*supra*), a record sufficient for the purposes of a review, of some review, by the appellate court. And so it is held in 25 Wend. (*supra*). In the notes of the revisors, it appears that they meant to provide a means by the use of which the need of a record in all cases might be done away with (3 R. S. [2d ed.], 351, note to original § 16; being § 10, 2 R. S., 739); though they indicate no such purpose in connection with the sections (§ 20 *et seq.*, 2 R. S., 740), more particularly in play in this case.

It does not appear from the error book, what were the errors alleged on the hearing before the General Term; but the bill of exceptions does show that there could have been made points for the plaintiff in error, for the hearing and determination of which the record before that court was ample. Could the court then properly say, that a return made in compliance with statutory provisions presented no case to be heard by it, and that the writ of error should be

dismissed without at all looking into the bill of exceptions or other matter in the return to ascertain if there was error ? It is probable from what has transpired before us on this argument, that the plaintiff in error also alleged another error, and that the return did not give the General Term the means of satisfactorily determining that allegation. But that did not render the writ of error a total failure to the plaintiff in error. It brought up a return, and presented thereon exceptions to decisions at the trial, as the statutes permit to be done ; and on such a return the statutes also say that the court shall proceed and render judgment. It may well be, that the plaintiff in error should be required to show affirmatively that there was error done ; and that to that end, he should produce to the court a return of the record of the proceedings of the trial court, wherein that error, if it exists, must of necessity appear. But where he does produce a return on which he can properly found an allegation of error, he cannot be deprived of the benefit thereof because he also alleges error upon which the return does not give the means of passing. So far as the return is sufficient, so far he is entitled to be heard ; and to dismiss his writ is not correct. It deprives him of the benefit of it, and, in some cases, of the stay of proceedings which he has got ; and *non constat* that he may again get that benefit.

There was, therefore, enough before the General Term for it to proceed upon and render judgment. The plaintiff in error had procured a return to his writ, which contained all of which the statute required the clerk to make return. By a dismissal of the writ and a remitting of the proceedings, with directions to fix another day for the execution of the sentence, the plaintiff in error lost the benefit of his writ. The sentence, for the execution of which another day was to be fixed, was the judgment of the court which the writ of error brought up for review. It was erroneous to dismiss it, for thus the errors of the Oyer and Terminer, if any, presented by the bill of exceptions, went uncorrected, involving, as they might, the life of the plaintiff in error.

Nor do we conceive that the General Term was so placed, as that it must pass upon an alleged error, without the return of the records needed therefor, or without the power

to command the return of those records. As we have said, it is for the plaintiff in error to show affirmatively that error has been committed. If the record which he brings up by his writ does not contain those proceedings in the court below, wherein that error, if done, would appear, he fails to show that it was done, and the appellate court cannot and need not pass upon that allegation of error. The General Term, however, was not confined to the matter returned to the writ of error. It might, on motion of the district attorney or of the plaintiff in error, or at its own suggestion, have directed a writ of *certiorari*, to bring before it whatever there was of record in the case, not contained in the return to the writ of error. (*Cancemi v. The People*, 18 N. Y., 128-133.)

And this is our conclusion, after a consideration of the provisions of the Revised Statutes, and their effect upon the law as it stood before them.

One tried on an indictment, and convicted by the verdict of a jury, and sentenced by the court, may obtain and file a bill of exceptions and sue out a writ of error. On the return of the clerk thereto, made in accordance with the statute, he may move the court to review the errors alleged by him. If they, or any of them, are such as that the matter contained in the return will necessarily show them, if they were made, the writ of error may not be dismissed, for the reason that the return does not present a complete and formal record of the judgment and proceedings of the trial court. Such as it does present the matter for determining, must be passed upon. But if errors are alleged to the court, which may or may not have occurred, and they not be shown by the matter in the return, the court may entertain a motion by the defendants in error or plaintiff in error, or of its own motion direct, that a writ of *certiorari* issue to the trial court, so that all may be brought up which the records of that court contain relating to the case. And it matters not whether the record or roll thereof has been made up before or after the writ of error sued out by the plaintiff in error, or before the writ of *certiorari* is directed, or after that. Whatever took place in the trial court which was matter proper for record, may as well after as before be incorporated in a roll and returned.

The action of the General Term should be undone, and it

should proceed on the writ of error and return thereto, or should bring before it by appropriate writ whatever else there may be of record which will enable it satisfactorily to review the judgment and proceedings of the Oyer and Terminer.

All concur, except MILLER and EARL, JJ., absent.

Judgment accordingly.

NOTE. — The Legislature, by the passage of the Code of Criminal Procedure, repealed the Revised Statutes applicable to the making up of a record of a judgment, in criminal cases, and a return of the clerk in cases of writs of error. The sections of the Code prescribing the practice in such cases, read as follows :

“§ 455. On the trial of an indictment, exceptions may be taken by the defendant, to a decision of the court, upon a matter of law, by which his substantial rights are prejudiced and not otherwise, in any of the following cases :

“ 1. In disallowing a challenge to the panel of the jury ;

“ 2. In admitting or rejecting testimony on the trial of a challenge for actual bias to any juror who participated in the verdict, or in allowing such challenge ;

“ 3. In admitting or rejecting witnesses or testimony, or in deciding any question of law, not a matter of discretion, or in charging or instructing the jury upon the law, on the trial of the issue.

“§ 456. A bill containing the exceptions must be settled and signed by the presiding judge, and filed with the clerk.

“§ 457. The bill of exceptions must be settled at the trial unless the court otherwise direct. If no such directions be given, the point of the exception must be particularly stated in writing, and delivered to the court, and must immediately be corrected or added to, until it is made conformable to the truth.

“§ 458. If the bill of exceptions be not settled at the trial it must be prepared and served, within five days thereafter, on the district attorney, who may, within five days, serve on the defendant or his counsel, amendments thereto. The defendant may then, within five days, serve the district attorney with a notice to appear before the presiding judge of the court, at a specified time, whether in or out of court, not less than five nor more than ten days thereafter, to have the bill of exceptions settled.

“§ 459. At the time appointed, the judge must settle and sign the bill of exceptions.

"§ 460. The time for preparing the bill of exceptions or the amendments thereto, or for settling the same, may be enlarged by consent of the parties, or by the presiding judge, or by a judge of the Supreme Court, but by no other officer.

"§ 461. If the bill of exceptions be not served within the time prescribed in section four hundred and fifty-eight, or within the enlarged time therefor, as prescribed in the last section, the exceptions are deemed abandoned. If it be served, and the parties omit, within the time limited by section four hundred and fifty-eight, the one to prepare amendments, and the other to give notice of appearance before the judge, they are respectively deemed, the one to have agreed to the bill of exceptions, and the other to the amendments.

"§ 485. When judgment upon a conviction is rendered, the clerk must enter the same upon the minutes, stating briefly the offence for which the conviction has been had ; and must, upon the service upon him of notice of appeal, immediately annex together and file the following papers, which constitute the judgment roll :

"1. A copy of the minutes of a challenge interposed by the defendant to a grand juror, and the proceedings and decisions thereon ;

"2. The indictment and a copy of the minutes of the plea or demurrer ;

"3. A copy of the minutes of a challenge, which may have been interposed to the panel of the trial jury, or to a juror who participated in the verdict, and the proceedings and decision thereon ;

"4. A copy of the minutes of the trial ;

"5. A copy of the minutes of the judgment ;

"6. A copy of the minutes of any proceedings upon a motion either for a new trial or in arrest of judgment ;

"7. The bill of exceptions, if there be one.

"§ 515. Writs of error and of *certiorari*, in criminal actions, and proceedings and special proceedings of a criminal nature, as they have heretofore existed, are abolished ; and hereafter the only mode of reviewing a judgment or order in a criminal action, or proceeding, or special proceeding of a criminal nature, is by appeal.

"§ 516. The party appealing is known as the appellant, and the adverse party as the respondent. But the title of the action is not changed in consequence of the appeal.

"§ 517. An appeal to the Supreme Court may be taken by the defendant from the judgment on a conviction after indictment, and, upon the appeal, any actual decision of the court in an intermediate order or proceeding forming a part of the judgment roll, as prescribed by section four hundred and eighty-five, may be reviewed.

"§ 518. An appeal to the Supreme Court may be taken by the people in the following cases, and no other :

"1. Upon a judgment for the defendant, on a demurrer to the indictment ;

"2. Upon an order of the court arresting the judgment.

"§ 519. An appeal may be taken from the judgment of the Supreme Court to the Court of Appeals in the following cases, and no other :

"1. From a judgment affirming or reversing a judgment of conviction ;

"2. From a judgment affirming or reversing a judgment for the defendant, on a demurrer to the indictment, or to an order of the court arresting the judgment ;

"3. From a final determination affecting the substantial right of a defendant.

"§ 520. All appeals provided for in this chapter may be taken as a matter of right.

"§ 521. An appeal must be taken within one year after the judgment was rendered.

"§ 522. An appeal must be taken by the service of a notice in writing on the clerk with whom the judgment roll is filed, stating that the appellant appeals from the judgment.

"§ 523. If the appeal be taken by the defendant a similar notice must be served on the district attorney of the county in which the original judgment was rendered.

"§ 524. If it be taken by the people, a similar notice must be served on the defendant, if he be a resident of, or imprisoned in the city or county ; or if not, on the counsel, if any, who appeared for him on the trial, if he reside or transact his business in the county. If the service cannot, after due diligence, be made, the appellate court, upon proof thereof, may make an order for the publication of the notice, in such newspaper, and for such time as it deems proper.

"§ 525. At the expiration of the time appointed for the publication, on filing an affidavit of the publication, the appeal becomes perfected.

"§ 526. An appeal taken by the people, in no case stays or affects the operation of a judgment in favor of the defendant, until the judgment is reversed.

"§ 527. An appeal to the supreme court from a judgment of conviction, or other determination from which an appeal can be taken, stays the execution of the judgment or determination upon filing with the notice of appeal a certificate of the judge who presided at

the trial, or of a judge of the supreme court, that in his opinion there is reasonable doubt whether the judgment should stand, but not otherwise, except that when the judgment is of death the appeal stays the execution, of course, until the determination of the appeal. And the appellate court may order a new trial if it be satisfied that the verdict against the prisoner was against the weight of evidence or against law, or that justice requires a new trial, whether any exception shall have been taken or not in the court below.

"§ 528. An appeal to the court of appeals, from a judgment of the supreme court, affirming a judgment of conviction, stays the execution of the judgment appealed from, upon filing, with the notice of appeal, a certificate of a judge of the court of appeals or of the supreme court, that in his opinion there is reasonable doubt whether the judgment should stand, but not otherwise, except that when the judgment is of death the appeal stays the execution of course until the determination of the appeal.

"§ 529. The certificate mentioned in the last two sections cannot, however, be granted upon an appeal on a conviction for felony, until such notice as the judge may prescribe has been given to the district attorney of the county where the conviction was had, of the application for the certificate. But the judge may stay the execution of the judgment in the meantime.

"§ 530. If the certificate, provided in sections five hundred and twenty-seven and five hundred and twenty-eight, be given, the sheriff must, if the defendant be in his custody, upon being served with a copy of the order, keep the defendant in his custody, without executing the judgment, and detain him to abide the judgment upon the appeal.

"§ 531. If, before granting of the certificate, the execution of the judgment have commenced, the further execution thereof is suspended, and the defendant must be restored by the officer in whose custody he is, to his original custody.

"§ 532. Upon the appeal being taken, the clerk, with whom the notice of appeal is filed, must, within ten days thereafter, without charge, transmit a copy of the notice of the appeal and of the judgment roll, as follows :

"1. If the appeal be to the supreme court, to the clerk of that court, where the next general term in the district is to be held ;

"2. If it be to the court of appeals, to the clerk of that court.

"§ 533. If the appeal be irregular, in a substantial particular, but not otherwise, the court may, on any day in term, on motion of

the respondent, upon five days' notice, served with copies of the papers on which the motion founded, order it dismissed.

"§ 534. The court may also, upon like motion, dismiss the appeal, if the return be not made, as provided in section five hundred and thirty-two unless for good cause they enlarge the time for that purpose.

"§ 535. An appeal to the supreme court may be brought to argument by either party, on ten days' notice, on any day, at a general term held in the department in which the original judgment was given.

"§ 536. An appeal to the court of appeals may, in the same manner, be brought to argument by either party, on any day in term.

"§ 537. If a counsel, within five days after the appeal, have given notice to the district attorney, that he appears for the defendant, notice of argument must be served on him, instead of the defendant; otherwise, notice must be served as the court may direct.

"§ 538. When the appeal is called for argument, the appellant must furnish the court with copies of the notice of appeal and judgment roll. If he fail to do so, the appeal must be dismissed, unless the court otherwise direct.

"§ 539. Judgment of affirmance may be given, without argument, if the appellant fails to appear. But judgment of reversal can only be given upon argument, though the respondent fail to appear.

"§ 540. Upon the argument of the appeal, if the crime be punishable with death, two counsel on each side must be heard if they require it. In any other case the court may, in its discretion, restrict the argument to one counsel on each side. The counsel for the defendant is entitled to the closing argument.

"§ 541. The defendant need not personally appear in the appellate court.

"§ 542. After hearing the appeal, the court must give judgment, without regard to technical errors or defects or to exceptions which do not affect the substantial rights of the parties.

"§ 543. Upon hearing the appeal the appellate court may, in cases where an erroneous judgment has been entered upon a lawful verdict, correct the judgment to conform to the verdict; in all other cases they must either reverse or affirm the judgment appealed from, and in cases of reversal may, if necessary or proper, order a new trial.

"§ 544. When a new trial is ordered, it shall proceed in all respects as if no trial had been had.

“§ 545. If a judgment against the defendant be reversed, without ordering a new trial, the appellate court must direct, if he be in custody, that he be discharged therefrom, or if he be admitted to bail, that his bail be exonerated, or if money be deposited instead of bail, that it be refunded to the defendant.

“§ 546. On a judgment of affirmance against the defendant, the original judgment must be carried into execution as the appellate court may direct, and if the defendant be at large, a bench warrant may be issued for his arrest. If a judgment be corrected, the corrected judgment must be carried into execution as the appellate court may direct.

“§ 547. When the judgment of the appellate court is given, it must be entered in the judgment book, and a certified copy of the entry forthwith remitted to the clerk with whom the original judgment roll is filed, or, if a new trial be ordered in another county, to the clerk of that county, unless the judgment be rendered in the absence of the adverse party, in which case, the court may direct it to be retained, not exceeding ten days.

“§ 548. The decision of the court and the return shall be remitted to the court below in the same form and manner as in civil actions.

“§ 549. After the certificate of the judgment has been remitted, as provided in section five hundred and forty-seven, the appellate court has no further jurisdiction of the appeal, or of the proceedings thereon ; and all orders, which may be necessary to carry the judgment into effect, must be made by the court to which the certificate is remitted, or by any court to which the cause may thereafter be removed.”

For the practice on appeals from courts of special sessions, see title three of the Code of Criminal Procedure, sections 749 to 772.

Ed.

COURT OF APPEALS.

NEW YORK, 1878.

BROWN V. THE PEOPLE.

The accused was indicted for the crime of assault and battery, and, on a plea of guilty, was sentenced by the Court of Sessions of Richmond county, "to be imprisoned in the Kings county penitentiary, for the term of six months."

The accused claimed that the sentence was unlawful, because the place of imprisonment named by the court was not the county jail of Richmond county.

The General Term in the second judicial department, affirmed the judgment of the Court of Sessions, and the accused brought error.

Held, that by the act of 1874, it is made lawful for the several boards of supervisors in this State to agree with any county, having a penitentiary therein, to receive into it, and there keep, any person sentenced to confinement for a term not less than sixty days. After notice that such agreement had been made, this law made it the duty of the courts of the counties so agreeing, whenever they sentenced a prisoner for a term not less than sixty days, if it was not a State prison offence, to sentence him to a penitentiary so agreed upon.

Held, that the Legislature had the power to designate a place of imprisonment in a part of the State other than the county jail of the county where the offence was tried. Though the Revised Statutes prescribe the county jail as the place of imprisonment for those guilty of certain misdemeanors, the Legislature is not restricted thereby, but may provide by law for another place and different institution within the State.

Max C. Huebner, for the plaintiff in error.

John Crook, district attorney, for the people.

FOLGER, J. The plaintiff in error was, on his own plea, found guilty of assault and battery, in the Richmond county sessions, and sentenced by that court "to be imprisoned in the Kings county penitentiary, for the term of six months."

It is claimed that this sentence is unlawful, because the place of imprisonment named by the court is not the county jail of Richmond county.

"The King can choose his own prison to detain, as well as his own court to try," says the court in *The King v. The Bishop of Rochester* (Fortescue Rep., 101). So can the People; but the People must prescribe by law what prison

or prisons they may choose. Now the People, in this case have prescribed. By the act of 1874 (Laws of 1874, chap. 209, p. 229), it is made lawful for the several boards of supervisors in this State to agree with any county, having a penitentiary therein, to receive into it, and there keep, any person sentenced to confinement for a term not less than sixty days. (§ 1.) It is made the duty of the boards to give public notice that an agreement has been made. (Id.) Thereupon it becomes the duty of every court in a county so agreeing, by which any person may be sentenced for a term not less than sixty days, for an offence not punishable by imprisonment in the State prison, to sentence such person to a penitentiary so agreed upon. If this law is valid, the sentence was well imposed, so far as any objection thereto has been taken by the plaintiff in error. But it is claimed, that by the act of 1874, the power of naming the prison for the offender, and thus of sentencing him, is conferred upon a board of supervisors, and is not reposed in the courts; and it is urged that the Legislature may not give such power to that board. We will not dispute the principle stated; we will differ from the statement of fact. The Legislature has not given that power to that board. It has empowered the board to enter into an agreement, by which a place of imprisonment will be provided; but the sentence to confinement there must come from the court, where alone is the power to impose the sentence.

It is not novel, that the place of imprisonment of an offender should by statute law depend somewhat upon the action of some body or officer other than the Legislature or the court inflicting the sentence. Thus the limits of the jail liberties were formerly fixed by the Courts of Common Pleas, acting under authority of statute; (1 R. S., p. 428, § 4); and in *Peters v. Hensy* (6 J. R., 121), (a civil case to be sure) it is said, quoting *Benafous v. Walker* (2 T. R., 126), that the statute makes them, "to all intents and purposes, the same as the walls of the prison," and that the prisoners are within the prison whilst on the limits. By the same statute (§ 3), sheriffs were permitted to remove their prisoners from their place to which they were sentenced to the new jails of their counties; thus the place of imprisonment was fixed by the sheriff, not by the courts. So there

are provisions in the Revised Statutes which authorize courts, other than those which have imposed the sentence, or which authorize sheriffs, to fix the place in which prisoners shall actually be confined. (2 R. S., pp. 428-429-430, §§ 14, 15, 18, 21, 24, 26.) These statutes have long stood unquestioned, and the scrutiny neither of the bench nor of the bar has detected any weakness in them. There are similar provisions in the laws of the United States; (1 Stat. at Large, 225; 3 id., 646; 4 id., 632; 13 id., 74); and what is more extreme, they confide to the keepers of the places of imprisonment the power of imposition of hard labor on the convict, though they do not require that such part of the punishment shall be named in the sentence of the court. (1 Brightly's Digest L. of U. S., pp. 216-217-218, §§ 80-84.) In Massachusetts, a law has been recognized as valid requiring certain measures to be taken by a Court of Sessions, before a jail is to be deemed a house of correction, and magistrates authorized to commit to it. (*Taunton v. Westport*, 12 Mass., 355; see also *Brennan's Case*, 10 Ad. & Ell. [N.S.], 492; *Martin v. Reg.*, 3 Cox Cr. Cas., 319-359.)

We have no doubt of the power of the Legislature to designate a place of imprisonment in a part of the State other than the county jail of the county of the offence and trial; nor of its power to use all the instrumentalities of the State in procuring such place, and in securing confinement in it. It is plain that the State, as a political body, organized to preserve and secure good order and obedience to the law, has a right to bring all accused persons to trial, according to law, and to impose upon persons found guilty a lawful sentence, and to make provision that when corporal punishment is imposed, it shall be endured. To bring to trial, to find guilty and to sentence, it uses the court, the judicial power. To provide a place in which to suffer punishment, it uses the counties, through their boards of supervisors, the ministerial or executive power. It is the State which acts through each of these instrumentalities; and so that the action is by virtue of law duly and previously passed, there is no ground for complaint. When the supervisors, by their agreement made in pursuance of law, have provided beforehand a place for the reception of a sentenced offender, they do not impose the sentence, nor do they select

the place of his punishment. It is the law of the Legislature and the judgment of the court which authorizes and directs his confinement there. The finger of the State moves, both in the action of the board and in that of the court; and, in both, acts in a way lawful. A law would be valid that required a county to erect a new county jail in some other town than that in which the existing jail stands; and that further directed, that when it was ready for use, the courts of the county should sentence a class of convicted persons to confinement therein. Though the supervisors would have the selection of the site of the new prison, and so, in a sense, of the precise place of confinement of those sentenced there, yet it is the court which imposes the sentence, and empowers the executive officers to imprison there; and it would be the State, acting through its different lawful instrumentalities, which wrought each act. All that is essential is, that there be legislative authority previously given to supervisors and to court. Though the Revised Statutes (2 R. S., p. 697), § 40, prescribe the county jail as the place of imprisonment for those guilty of certain misdemeanors, the Legislature is not restricted thereby, but may provide by law for another place and different institution within the State. It has done that, by the act of 1874.

These views cover and refute all the points taken before us by the plaintiff in error. We do not look further into the case than those points require.

The judgment of the Court of Sessions and that of the General Term should be affirmed.

All concur.

Judgment affirmed.

COURT OF APPEALS.

NEW YORK, 1878.

BROTHERTON V. THE PEOPLE.

The accused was indicted, tried and convicted, in the Oyer and Terminer of the county of Cayuga, of the crime of murder in the first degree. The General Term of the Supreme Court, in the fourth judicial department, affirmed the judgment, and the accused brought error.

On the trial of the accused, the *ante mortem* declarations of the deceased, were admitted in evidence, under objections. Those objections were, that the dying declarations of the deceased should not have been admitted, because it did not appear they were made under an impression of immediate dissolution, and, because they were expressions of opinion, not statements of what the deceased knew to be facts.

Held, that these objections are not tenable. The facts, as they appeared on the trial were, that on Thursday evening, August 9, 1877, the deceased, Charles Moore, a farmer living in Cayuga county, who was a son-in-law of the accused, was shot as he was returning from his pasture, and died on the Sunday following. From the time he was shot the deceased was apprehensive that the wound was fatal. On Friday the deceased repeatedly stated that he would not recover, and on Saturday morning he was told by his physician that he must die, and there is not a doubt from the evidence but that he believed so himself. The only declarations allowed in evidence were the ones made by the deceased on Saturday, a short time before his death.

As to the second ground of objection, it appeared that the prisoner approached the deceased, disguised as a tramp, and that deceased stated, that at first he did not recognize him, but when he drew the pistol "and commenced his pranks," he knew that it was the prisoner. This was the relation of a fact, and that he spoke from knowledge derived from personal observation.

The objection was made upon the argument, that the copy of the indictment in the record does not contain the indorsed certificate of the foreman of the grand jury that it is a true bill.

Held, that as no such point was made on the trial it is not available in the appellate court. If it were, the record states that the grand jury appeared in open court, and duly presented the indictment, a copy of which is set forth. From this it must be assumed that it was presented according to law.

Held further, that the certificate of the foreman is no part of the indictment, but is the statutory mode of authenticating it, and the record furnishes evidence that it was so authenticated.

The judge in his charge to the jury expressed himself as follows: "This allegation of insanity is an affirmative issue, which the defendant is bound to prove, and you must be satisfied from the testimony introduced by him that he was insane." "If there is a well founded doubt whether this man was insane at the time he fired the pistol, you will acquit him."

Held that, take the two paragraphs of the charge together, there was no error.

The question may be stated in a variety of language. There is no rigid rule prescribing the particular terms to be employed, if the substance of the rule is preserved. The jury could not have misunderstood their duty under these instructions, nor have been misled by them.

Held further, that crimes can only be committed by human beings who are in a condition to be responsible for their acts, and upon this general proposition the prosecutor holds the affirmative, and the burden of proof is upon him. Sanity being the normal and usual condition of mankind, the law presumes that every individual is in that state. Hence a prosecutor may rest upon that presumption without other proof. The fact is deemed to be proved *prima facie*. Whoever denies this or interposes a defence based upon its untruth, must prove it; the burden of showing insanity is upon the person who alleges it, and if evidence is given tending to establish insanity, then the question is presented, whether the crime was committed by a person responsible for his acts. Upon this question the presumption of sanity, and all the evidence are to be considered, and the prosecutor holds the affirmative, and if a reasonable doubt exists as to whether the prisoner is sane, or not, he is entitled to the benefit of the doubt, and to an acquittal.

Held further, that the question relating to the state of the prisoner's mind at the time the alleged act was committed, was a question of fact, and was fully litigated and fairly submitted to the jury, and their decision is conclusive.

John D. Teller, for the accused.

S. E. Payne, for the people.

CHURCH, Ch. J. A question is made that the *ante mortem* declarations of deceased were improperly admitted on two grounds: First. Because the evidence did not show a proper foundation for its admission; and, Second. Because it was a statement of opinion merely and not of facts. The objection is not tenable.

The deceased was shot on Thursday evening, and from that time he was apprehensive that the wound was fatal, but no declarations were allowed by the judge until Saturday, a short time before he became unconscious. On Friday the deceased repeatedly stated that he would not recover, and on Saturday morning he was told by his physician that he must die, and there is not a doubt from the evidence but that he believed so himself. (1 Greenl. on Ev., § 158.) Nor is the other ground tenable. The prisoner approached the deceased, disguised as a tramp, and the deceased stated, that at first he did not recognize him, but that when he drew the pistol "and commenced his pranks," he knew that it was the prisoner. The deceased was the

son-in-law of the prisoner, and was intimately acquainted with him, and his language indicates that he spoke from knowledge derived from personal observation.

The objection that the copy of the indictment in the record does not contain the indorsed certificate of the foreman of the grand jury that it is a true bill, is not available to prove that there was no certificate. No such point was made on the trial. Besides the record states that the grand jury appeared in open court, and duly presented the indictment, a copy of which is set forth. From this we must assume that it was presented according to law. The certificate of the foreman is no part of the indictment, but is the statutory mode of authenticating it, and the record furnishes evidence that it was so authenticated.

We have examined with care all the considerations presented by the counsel for the prisoner in respect to the alleged error in the charge of the judge upon the question of insanity, and we concur with the opinion delivered at the General Term, that the error, if one was committed, is not available, because no exception was taken, and also that the charge was substantially correct. It has been too often reiterated to be regarded an open question, that errors upon criminal trials can only be available in this court by exceptions duly taken on the trial.

I have however examined the charge, and there was no substantial error committed by the judge.

Crimes can only be committed by human beings who are in a condition to be responsible for their acts, and upon this general proposition the prosecutor holds the affirmative, and the burden of proof is upon him. Sanity being the normal and usual condition of mankind, the law presumes that every individual is in that state. Hence a prosecutor may rest upon that presumption without other proof. The fact is deemed to be proved *prima facie*. Whoever denies this or interposes a defence based upon its untruth, must prove it; the burden, not of the general issue of crime by a competent person, but the burden of overthrowing the presumption of sanity and of showing insanity, is upon the person who alleges it, and if the evidence is given tending to establish insanity, then the general question is presented to the

court and jury whether the crime, if committed, was committed by a person responsible for his acts, and upon this question the presumption of sanity, and the evidence, are all to be considered, and the prosecutor holds the affirmative, and if a reasonable doubt exists as to whether the prisoner is sane, or not, he is entitled to the benefit of the doubt, and to an acquittal. The question may be stated in a variety of language. There is no rigid rule prescribing the particular terms to be employed, if the substance of the rule is preserved.

The judge in this case among others not criticised, used this expression: "This allegation of insanity is an affirmative issue which the defendant is bound to prove, and you must be satisfied from the testimony introduced by him that he was insane." And he also charged that if "there is a well-founded doubt whether this man was insane at the time he fired the pistol, you will acquit him." Take the two paragraphs of the charge together, there was no error. The prisoner was bound to prove that he was not sane, and whether insanity is called an affirmative issue, or it is stated that the burden of proof of insanity is upon the prisoner in order to overcome the presumption of insanity, is not very material, if the jury are told as they were in this case that a reasonable doubt upon that question entitled the prisoner to an acquittal. The jury could not have misunderstood their duty under these instructions, nor have been misled by them, and if an exception had been taken, it must have been overruled.

It being a capital case we have taken time for examination, and we are unable to find any error of law committed against the prisoner on the trial. The question relating to the state of the prisoner's mind at the time the alleged act was committed, was a question of fact, and was fully litigated and fairly submitted to the jury, and their decision is conclusive upon the court.

The judgment must be affirmed. All concur, except MILLER and EARL, JJ., absent at argument.

Judgment affirmed.

NOTE. — The Revised Statutes in force at the time the foregoing decision was rendered, reads as follows :

"§ 36. No indictment can be found without the concurrence of at least twelve grand jurors ; when so found, and not otherwise, the foreman of the grand jury shall certify under his hand that such indictment is a true bill.

"§ 38. Indictments found by a grand jury, shall be presented by their foreman, in their presence, to the court, and shall be there filed, and remain as public records ;" * * *

The sections of the Code of Criminal Procedure now in force, reads :

"§ 268. An indictment cannot be found without the concurrence of at least twelve grand jurors. When so found it must be indorsed, 'A true bill,' and the indorsement must be signed by the foreman of the grand jury.

"§ 272. An indictment, when found by the grand jury, as prescribed in section two hundred and sixty-eight, must be presented by their foreman in their presence to the court, and must be filed with the clerk, and remain in his office as a public record, but it must not be shown to any person other than a public officer, until the defendant has been arrested or appeared." Ed.

COURT OF APPEALS.

NEW YORK, 1878.

HAWKER V. THE PEOPLE.

The accused was tried and convicted in the Court of Sessions of the Peace, in and for the county of Kings, and, upon a general verdict of guilty, the court sentenced the prisoner to the penitentiary for the term of ten years. The prisoner was convicted under the Laws of 1872, in relation to abortions. The first two counts of the indictment were under the first section, and the third count under the third section of that act. The prisoner pleaded not guilty to the whole indictment, and did not ask the court at the trial to compel the district attorney to elect upon which count or counts in the indictment the trial should proceed. At the close of the evidence on both sides, the counsel for the defendant, asked the court to acquit the accused under each count. The court declined, and an exception was taken. The court charged the jury that a general verdict of guilty would cover all the counts, but that if they should find the prisoner guilty only under the third count, their verdict should be "guilty under the third count." After the return of a general verdict of guilty, by the jury, the prisoner's counsel moved in arrest of judgment, which was denied and the prisoner was sentenced. The objection raised was, that the indictment was defective inas-

much as it charged two distinct felonies, one under the first section, and one under the third section of the statute.

Held, that the objection is not well founded. All the counts are under the same statute, and relate to the same transaction. In such a case it matters not that the offence alleged to have been committed is charged in different ways in several counts for the purpose of meeting the evidence that may be adduced. And it matters not that the offences alleged in the different counts are of different grades, and call for different punishments. Burglary with an attempt to commit larceny, with a count for larceny; burglary and larceny; rape and an assault with an attempt to commit rape; larceny and receiving stolen goods; assault with intent to kill and a simple assault may be united, and it matters not that the offences thus united call for different punishments; so long as all the counts relate to the same transaction.

There was an objection made that there was no proof that the child was living at the time of the operation.

Held, that the evidence in the case shows that the doctress who saw the foetus a few hours after it was brought into the world, gave it as her belief, as an expert, that it was then alive. The case on this point was rested on her evidence, and we cannot say that there was no evidence on the subject.

A. Oakley Hall, for the prisoner.

Nathaniel C. Moak, for the people.

EARL, J. The plaintiff in error was convicted under the act, chapter 181 of the Laws of 1872, in relation to abortions and other offences.

Section 1 of the act provides, among other things, that any person who shall wilfully use any instrument with intent thereby to produce a miscarriage of any woman with child, unless the same shall have been necessary to preserve her life, or that of such child, shall in case the death of such child be thereby produced, be deemed guilty of a felony punishable by imprisonment in the State prison for a term of not less than four, nor more than twenty years. Section 3 provides, among other things, that any person who shall use any instrument upon any pregnant woman, with intent thereby to produce a miscarriage, shall upon conviction, be punished by confinement in a county jail or State prison for not less than one, nor more than three years.

The first two counts of the indictment are under the first section, and the third count is under the third section. The plaintiff in error pleaded not guilty to the whole indictment, and at the trial did not ask that the district attorney be

compelled to elect upon which count or counts in the indictment the trial should proceed. He went to trial without objection, upon all the counts. Evidence was given upon both sides, and at the close of the evidence his counsel asked the court to direct the jury to acquit his client under each count, and the court declined, and he excepted. The court charged the jury that a general verdict of guilty would cover all the counts, but that if they should find the prisoner guilty only under the third count, their verdict should be "guilty under the third count." The jury returned a general verdict of guilty.

The prisoner's counsel then moved in arrest of judgment which was denied, and the court sentenced the prisoner to confinement in the penitentiary for ten years.

It is now objected on behalf of the plaintiff in error, that the indictment is fatally defective because it charges two distinct felonies, one under the first section, and one under the third section. This objection is not well founded. All the counts are under the same statute, and relate to the same transaction. In such a case it matters not that the offence alleged to have been committed is charged in different ways in several counts for the purpose of meeting the evidence that may be adduced. And it matters not that the offences alleged in the different counts are of different grades, and call for different punishments. (*People v. Rynders*, 12 Wend., 425; *People v. Baker*, 3 Hill, 159; *People v. Costello*, 1 Denio, 83; *Taylor v. People*, 12 Hun, 213; *Regina v. Trueman*, 8 Carr. & P., 727; Wharton's Crim. Law, § 416.) A count for burglary with an attempt to commit larceny may be united with a count for larceny. So burglary and larceny; rape and an assault with intent to commit rape; larceny and receiving stolen goods; assault with intent to kill, and a simple assault, may be united, and it matters not that the offences thus united, call for different punishments. In *People v. Baker* there were three counts; one for receiving stolen goods, one for burglary, and one for grand larceny, and the indictment was held good.

So long as the counts relate to the same transaction, as in this case, there can be no objection to the union of such counts in the same indictment. If the prisoner is likely to

be embarrassed in his defence, the court can, in its discretion, compel the prosecution to elect upon which count or counts the prisoner shall be tried, and the court can give such directions as to the verdict that it may be known for what offence the prisoner is found guilty. The plaintiff in error can have no valid objection here upon the form of the verdict, because his rights were saved by the charge of the court which directed the jury if they found the prisoner guilty, only under the third count, to say so by their verdict. The general verdict was guilty under the whole indictment, and upon such a verdict he was properly sentenced for the highest offence charged.

The objection is also made here that there was no proof that the child was living at the time the operation was performed, and hence that it could not be found that the prisoner produced the death. This objection does not seem to have been distinctly made during the progress of the trial. But there was some evidence from which the jury could have properly inferred that there was life in the fœtus. The fœtus was described and proved to have been of the usual size for its age. The doctress who saw it a few hours after it was brought into the world, gave it as her belief as an expert, that it was then alive. It is true that she said she gave it no thought at the time, but yet we cannot say that she did not observe enough, with her knowledge and experience, to give an opinion. And she was not cross-examined on the subject with the view to test her ability to give an opinion. The case on this point was rested on her evidence, and we cannot say that there was no evidence on the subject.

There are no other objections which require consideration, and the judgment must therefore be affirmed.

All concur, except CHURCH, Ch. J., not voting, and ANDREWS, J., absent.

Judgment affirmed.

NOTE. — The forms of pleading, in criminal actions, existing at the time of the decision in the foregoing case of *Hawker v. The People*, have been abolished by the Criminal Code of Procedure and other forms of pleading, and the rules by which the sufficiency of pleadings

is to be determined, substituted. The Code of Criminal Proceedings, on that subject, reads as follows :

"§ 273. All the forms of pleading in criminal actions, heretofore existing, are abolished ; and hereafter, the forms of pleading, and the rules by which the sufficiency of pleadings is to be determined, are those prescribed by this Code.

"§ 274. The first pleading on the part of the people is the indictment.

"§ 275. The indictment must contain :

"1. The title of the action, specifying the name of the court to which the indictment is presented, and the names of the parties ;

"2. A plain and concise statement of the act constituting the crime, without unnecessary repetition.

"§ 278. The indictment must charge but one crime and in one form, except as in the next section provided.

"§ 279. The crime may be charged in separate counts to have been committed in a different manner, or by different means ; and where the acts complained of may constitute different crimes, such crimes may be charged in separate counts.

COURT OF APPEALS.

NEW YORK, 1878.

THE PEOPLE V. MANN.

The accused was indicted for forgery in the third degree for executing the following instrument :

"No. —. SARATOGA COUNTY TREASURER'S OFFICE,

"Ballston Spa, June 18, 1875.

"In pursuance of a resolution passed November, 1874, by the board of supervisors of Saratoga county, the county of Saratoga promises to pay at the Saratoga County Treasurer's office, on or before the 15th of February, 1876, to the First National Bank of Ballston Spa, or bearer, \$10,000, at seven per cent. interest, value received.

"\$10,000.

HENRY A. MANN, *Treasurer.*"

At the time of the execution of the foregoing paper the accused was treasurer of Saratoga county. This paper was discounted by the payee and the proceeds were received by Mann. It was shown on the trial that Mann had no authority to make or issue such instrument. The accused was convicted at the Washington county Court of Oyer and Terminer. The General Term of the third judicial department reversed the judgment, and the people bring error.

Held, that the statute under which the accused was convicted defines the offence of forgery in the third degree to be, the falsely making or altering, with intent to defraud, any instrument or writing "being or purporting to be the act of another," whereby any pecuniary demand shall be or purport to be created, etc., etc. That the "act" referred to in the statute is the making of the instrument, and that the offence consists in falsely making an instrument purporting to be made by another.

Held further, that the offence intended to be defined by the statute is forgery, and not a false assumption of authority. One who makes an instrument signed with his own name, but purporting to bind another, does not make an instrument purporting to be the act of another. The instrument shows upon its face that it is made by himself and is in point of fact his own act. It is not false as to the person who made it. The wrong done, where such an instrument is made without authority, consists in the false assumption of authority to bind another, and not making a counterfeit or false paper.

Esek Cowen, for the people.

Nathaniel C. Moak, for the defendant.

RAPALLO, J. The statute under which the defendant in error was convicted defines the offence of forgery in the third degree to be, so far as applicable to this case, falsely making or altering, with intent to defraud, any instrument or writing "being or purporting to be the act of another" whereby any pecuniary demand shall be or purport to be created, etc.

We cannot adopt the interpretation of this statute claimed by the counsel for the People. He contends that one who without authority makes an instrument purporting in its body to be the contract or obligation of a county, though he signs his own name to it as the official representative of the county, comes within the purview of the act. That the words "purporting to be the act of another" are synonymous with "purporting to be the contract or obligation of another." We think that the "act" referred to in the statute is the making of the instrument, and that the offence consists in falsely making an instrument purporting to be made by another. The offence intended to be defined by the statute is forgery, and not a false assumption of authority. One who makes an instrument signed by his own name, but purporting to bind another, does not make an instrument purporting to be the act of another. The instrument shows upon its face that it is made by himself, and

is in point of fact his own act. It is not false as to the person who made it, although by legal intendment it would, if authorized, be deemed the act of the principal, and be as binding upon him as if he had actually made it. The wrong done, where such an instrument is made without authority, consists in the false assumption of authority to bind another, and not in making a counterfeit or false paper.

Suppositious cases have been ingeniously suggested for the purpose of showing that unless the construction claimed is adopted, forgeries of corporate names and of the names of joint-stock companies might not be reached by the statute. It will be time to deal with those cases when they arise. It is sufficient for the purposes of the present case that the instrument which the defendant is charged with having forged purports on its face to have been made by himself and not by any other person.

The judgment of the General Term should be affirmed.

All concur, except HAND, J., not voting.

Judgment affirmed.

NOTE. — The Revised Statutes defining forgery were in force at the time the case of *The People v. Mann* was decided. Since then those statutes have been repealed and the statute at present in force, defining forgery, will be found in the Penal Code at Chapter III. The Penal Code reads as follows :

“§ 509. A person is guilty of forgery in the first degree who with intent to defraud, forges,

“1. A will or codicil of real or personal property, or the attestation thereof, or a deed or other instrument, being or purporting to be the act of another, by which any right or interest in property is or purports to be transferred, conveyed, or in any way charged or affected ; or,

“2. A certificate of the acknowledgment or proof of a will, codicil, deed, or other instrument, which by law may be recorded or given in evidence when duly proved or acknowledged, made or purporting to have been made by a court or officer duly authorized to make such certificate ; or,

“3. A certificate, bond, paper writing, or other public security, issued or purporting to have been issued by or under the authority of this State, or of the United States, or of any other State or ter-

ritory of the United States, or of any foreign government, country or State, or by any officer thereof in his official capacity, by which the payment of money is promised absolutely or upon any contingency, or the receipt of any money or property is acknowledged, or being or purporting to be evidence of any debt or liability, either absolute or contingent, issued or purporting to have been issued by lawful authority ; or,

"4. An indorsement or other instrument, transferring or purporting to transfer the right or interest of any holder of such a certificate, obligation, public security, evidence of debt or liability, or of any person entitled to such right or interest ; or,

"5. A certificate of stock, bond or other writing, bank note, bill of exchange, draft, check, certificate of deposit, or other obligation or evidence of debt, issued or purporting to be issued by any bank, banking association or body corporate existing under the laws of this State, or of the United States, or of any other State, government or country, declaring or purporting to declare any right, title or interest of any person in any portion of the capital stock, or property of such a body corporate, or promising or purporting to promise or agree to the payment of money, or the performance of any act, duty or obligation ; or,

"6. An indorsement or other writing, transferring or purporting to transfer the right or interest of any holder of such a certificate, bond, or writing obligatory, or of any person entitled to such right or interest.

"§ 510. An officer authorized to take the proof or acknowledgment of an instrument which by law may be recorded, who wilfully certifies falsely that the execution of such an instrument was acknowledged by any party thereto, or that the execution of any such instrument was proved, is guilty of forgery in the first degree.

"§ 511. A person is guilty of forgery in the second degree who, with intent to defraud,

"1. Forges the great or privy seal of this State, the seal of any court of record, or of any public office or officer authorized by law, or of any body corporate created by or existing under the laws of this State, or of the United States, or of any other State or any territory of the United States, or of any other State, government or country, or any impression of such a seal ; or any gold or silver coin, whether of the United States or of any foreign State, government or country ; or,

"2. Forges a record of a will, conveyance or instrument of any kind, the record of which is by the law of this State made evidence,

or of any judgment, order, or decree of any court or officer, or a certified or authenticated copy thereof ; or,

“A judgment roll, judgment, order, or decree of any court or officer, or an enrolment thereof, or a certified or authenticated copy thereof, or any document or writing purporting to be such judgment, order, decree, enrolment, or copy ; or,

“An entry made in any book of record or accounts, kept by or in the office of any officer of this State, or of any village, city, town, or county of the State, by which any demand, claim, obligation, or interest, in favor of or against the people of the State, or any city, village, town or county, or any officer thereof, is or purports to be created, increased, diminished, discharged, or in any manner affected ; or an entry made in any book of records or accounts kept by a corporation doing business within the State, or in any account kept by such a corporation, whereby any pecuniary obligation, claim, or credit is or purports to be created, increased, diminished, discharged, or in any manner affected ; or,

“An instrument, document, or writing, being or purporting to be, a process or mandate issued by a competent court, magistrate, or officer of the State, or the return of an officer, court or tribunal, to such a process or mandate ; or a bond, recognizance, undertaking, pleading, or proceeding, filed or entered in any court of the State, or a certificate, order or allowance by a competent court, or officer, or a license or authority granted pursuant to any statute of the State, or a certificate, document, instrument, or writing, made evidence by any law or statute ; or,

“An instrument or writing, being or purporting to be the act of another, by which a pecuniary demand or obligation is or purports to be or to have been created, increased, discharged, or diminished, or in any manner affected, or by which any rights or property whatever are or purport to be or to have been created, transferred, conveyed, discharged, increased, or diminished, or in any manner affected, the punishment for forging, altering, or counterfeiting which is not hereinbefore prescribed, by which false making, forging, altering, or counterfeiting, any person may be bound, affected or in any way injured in his person or property ; or,

“3. Makes or engraves a plate in the form or similitude of a promissory note, bill of exchange, bank note, draft, cheque, certificate of deposit, or other evidence of debt, issued by a banker, or by any banking corporation or association, incorporated or carrying on business under the laws of the State, or of the United States, or of any other State or territory of the United States, or of any foreign

government, or country, without the authority of such banker, or banking corporation or association ; or,

“Without like authority, has in his possession or custody such a plate, with intent to use, or permit the same to be used, for the purpose of taking therefrom any impression to be uttered ; or,

“Without like authority, has in his possession or custody any impression taken from such plate, with intent to have the same filled up and completed for the purpose of being uttered ; or,

“Makes or engraves, or causes to be made or engraved, upon any plate, any figures or words, with intent that the same may be used for the purpose of falsely altering any evidence of debt hereinbefore mentioned.

“§ 512. A plate, specified in the last section, is in the form and similitude of the genuine instrument imitated, if the finished parts of the engraving thereupon resemble and conform to similar parts of the genuine instruments.

“§ 513. An instrument partly written and partly printed, or wholly printed with a written signature thereto, and any signature or writing purporting to be a signature of, or intended to bind an individual, a partnership, a corporation or association or an officer thereof, is a written instrument or a writing, within the provisions of this chapter.

“§ 514. A person who neither,

“1. Being an officer or in the employment of a corporation, association, partnership or individual, falsifies, or unlawfully and corruptly alters, erases, obliterates or destroys any accounts, books of accounts, records, or other writing, belonging to or appertaining to the business of the corporation, association, partnership, or individual ; or,

“2. Who, with intent to injure or defraud, shall falsely make, alter, forge or counterfeit, shall cause, aid, abet, assist or otherwise connive at, or be a party to, the making, altering, forging or counterfeiting of any letter, telegram, report or other written communication, paper or instrument, by which making, altering, forging or counterfeiting, any other person shall be in any manner injured in his good name, standing, position or general reputation ; or,

“3. Who shall utter, or shall cause, aid, abet or otherwise connive at, or be a party to, the uttering of any letter, telegram, report or other written communication, paper or instrument, purporting to have been written or signed by another person, or any paper purporting to be a copy of any such paper or writing where no original existed, which said letter, telegram, report or other written communication, paper or instrument, or paper purporting to be a copy

thereof, as aforesaid, the person uttering the same shall know to be false, forged or counterfeited, and by the uttering of which the sentiments, opinions, conduct, character, prospects, interests or rights of such other person shall be misrepresented or otherwise injuriously affected,

"Is guilty of forgery in the third degree.

"§ 515. A person who, with intent to defraud or to conceal any larceny or misappropriation by any person of any money or property, either,

"1. Alters, erases, obliterates, or destroys an account, book of accounts, record, or writing, belonging to, or appertaining to the business of, a corporation, association, public office or officer, partnership or individual ; or,

"2. Makes a false entry in any such account or book of accounts ; or,

"3. Wilfully omits to make true entry of any material particular in any such account or book of accounts, made, written, or kept by him, or under his direction ;

"Is guilty of forgery in the third degree.

"§ 516. A person who, with intent to defraud, forges, counterfeits, or falsely alters any ticket, cheque or other paper or writing, entitling or purporting to entitle the holder or proprietor thereof to a passage upon any railway or in any vessel or other public conveyance ; and a person who, with like intent, sells, exchanges or delivers, or keeps or offers for sale, exchange or delivery, or receives upon any purchase, exchange or delivery, any such ticket, knowing the same to have been forged, counterfeited or falsely altered, is guilty of forgery in the third degree.

"517. A person who forges, counterfeits or alters any postage or revenue stamp of the United States, or who sells, or offers, or keeps for sale, as genuine or as forged, any such stamp, knowing it to be forged, counterfeited or falsely altered, is guilty of forgery in the third degree.

"§ 518. An officer, agent or other person employed by any company or corporation existing under the laws of this State, or of any other State or territory of the United States, or of any foreign government, who wilfully and with a design to defraud, sells, pledges or issues, or causes to be sold, pledged or issued, or signs or procures to be signed with intent to sell, pledge or issue, or to be sold, pledged or issued, a false, forged or fraudulent paper, writing or instrument, being or purporting to be a scrip, certificate or other evidence of the ownership or transfer of any share or shares of the capital stock of such company or corporation, or a bond or other

evidence of debt of such company or corporation, or a certificate or other evidence of the ownership or of the transfer of any such bond or other evidence of debt, is guilty of forgery in the third degree, and upon conviction, in addition to the punishment prescribed in this title for that offence, may also be sentenced to pay a fine not exceeding three thousand dollars.

“§ 519. The false making or forging of an instrument or writing, purporting to have been issued by or in behalf of a corporation or association, State or government, and bearing the pretended signature of any person, therein falsely indicated as an agent or officer of such corporation, is a forgery in the same degree, as if that person were in truth such officer or agent of the corporation or association, State or government.

“§ 520. The expressions ‘forge,’ ‘forged’ and ‘forging,’ as used in this chapter, include false making, counterfeiting and the alteration, erasure, or obliteration of a genuine instrument, in whole or in part, the false making or counterfeiting of the signature, of a party or witness, and the placing or connecting together with intent to defraud different parts of several genuine instruments.

“§ 521. A person who, knowing the same to be forged or altered, and with intent to defraud, utters, offers, disposes of or puts off as true, or has in his possession, with intent to utter, offer, dispose of, or put off, either,

“1. A forged seal or plate, or any impression of either; or,

“2. A forged coin; or,

“3. A forged will, deed, certificate, indorsement, record, instrument or writing, or other thing, the false making, forging, or altering of which is punishable as forgery;

“Is guilty of forgery in the same degree as if he had forged the same.

“§ 522. Whenever the false making or uttering of any instrument or writing is forgery in any degree, a person is guilty of forgery in the same degree, who, with intent to defraud, offers, disposes of, or puts off such an instrument or writing subscribed or indorsed in his own name, or that of any other person, whether such signature be genuine or fictitious, under the pretence that such subscription or indorsement is the act of another person of the same name, or of a person not in existence.

“§ 523. Forgery in the first degree is punishable by imprisonment for not less than ten years.

“§ 524. Forgery in the second degree is punishable by imprisonment for not more than ten nor less than five years.

"§ 525. Forgery in the third degree is punishable by imprisonment for not more than five years.

"§ 526. A person who has in his possession a counterfeit of any gold or silver coin, whether of the United States or of any foreign country or government, knowing the same to be counterfeited, with intent to sell, utter, use, circulate or export the same, as true or as false, or to cause the same to be so uttered or passed, is punishable by imprisonment not more than five years, or by a fine not exceeding five hundred dollars, or by both such fine and imprisonment.

"§ 527. A person who with intent to defraud, prints, circulates, or distributes a letter, circular, card, pamphlet, handbill, or any other written or printed matter, offering or purporting to offer for sale, exchange, or as a gift, counterfeit coin or paper money, or giving or purporting to give information where counterfeit coin or paper money can be procured, is punishable by imprisonment not more than five years, or by a fine not exceeding five hundred dollars, or by both such fine and imprisonment." Ed.

SUPREME COURT.

General Term — New York, 1878.

HINMAN V. THE PEOPLE.

The accused was indicted in the Oyer and Terminer held in the county of Ontario, for grand larceny, and by that court the indictment was sent for trial to the Sessions of that county. After the charge to the jury, they retired to consider their verdict and the justices of the Sessions who sat as part of the court during the trial, left the court room. While they were absent, the jury came in and stated that they had agreed upon their verdict. The county judge then, in the absence of the other members of the court, received the verdict of the jury. The jury was polled at the request of the counsel for the accused, and each answering guilty, their verdict was entered by the clerk. The counsel for the accused made a motion in arrest of judgment, upon the ground that the verdict was improperly received and entered. The motion was denied and the accused was sentenced by the county judge, to imprisonment in the Monroe county penitentiary for one year.

Held, that the rule is too well settled to be departed from or modified, that a verdict must be delivered in open court. To permit verdicts to be received otherwise than in open court, would lead to the greatest abuses. When the verdict was received, in this case, the court was held by the county judge only, and he cannot, under the law, hold a Court of Sessions. The conviction was, therefore, illegal and must be reversed.

E. W. Gardner, for the accused.

Frank Rice, for the people.

MULLIN, P. J.: The plaintiff in error was indicted in the Ontario Oyer and Terminer for grand larceny. The indictment was sent for trial to the Sessions of that county, and the case came on for trial at a term of that court held in June last. After the charge by the court, the jury retired to consider their verdict and the county judge commenced the trial of a civil cause. The justices of Sessions, who were members of the court during the trial, left the court room, one of them going into the hall on the lower floor of the court-house, and the other went into the street. While the justices were absent from the court room, the jury came in and announced that they had agreed on a verdict. The county judge in the absence of the justices of Sessions received the verdict. The jury was polled at the request of the counsel for the plaintiff in error, and the verdict of guilty was entered by the clerk. Subsequently the plaintiff's counsel made a motion in arrest of judgment, upon the ground that the verdict was improperly received and entered, and upon other grounds not deemed material to be considered on this writ of error. The motion was denied and the prisoner sentenced to imprisonment in the Monroe penitentiary for one year.

The rule is too well settled to be departed from or modified that a verdict must be delivered in open court. It cannot be received privately nor by the clerk or other person in the absence of the court, nor even by agreement of counsel. (1 Chitty's Cr. L., 636.) To permit verdicts to be received otherwise than in open court, would lead to the greatest abuses. The people or the prisoner might be grossly wronged without any means of redress, or the administration of the law brought into contempt or subjected to suspicion.

The Court of Appeals in *Blend v. The People* (41 N. Y., 604), decided that the conviction of the plaintiff in error should be reversed, because one of the justices of Sessions left the bench during the trial, and the county judge appointed another justice of the peace to fill his place, and the

trial proceeded before the court thus organized. The learned judge who delivered the opinion of the court, says, when Elwood abandoned the trial the court was disorganized so far as this trial was concerned. This is not the case when members of the court leave the bench for a few moments intending to return, and do return, but is a total abandonment of the trial in consequence of which one-third of the court is changed.

In the case of *The People v. Dohring* (59 N. Y., 374), it was held that a court of Sessions was not disorganized because one of the justices of Sessions left the bench during the trial, went on to the witness stand and was examined as a witness in the cause. FOLGER, J., assigns as a reason why the irregularity of the justice leaving the bench and being examined as a witness, did not disorganize the court: "That the justice did not leave the court room while the trial was progressing; and did not abandon the trial; he left the bench for a space, intending soon to return to it, and did return." The ruling in the case last cited followed that in *Tuttle v. The People* (36 N. Y., 431), *The People v. Reagle* (60 Barb., 527).

The case now in hand does not come within the principles laid down in the last two cases cited. In this case the justices of Sessions left, not the court room only, but one of them left the court house. When the verdict was received the court was held by the county judge only, and he cannot, under the Constitution, hold a Court of Sessions. The conviction was, therefore, illegal and must be reversed. The case of *The People v. Shaw* (63 N. Y., 36) is directly in point and decisive of the case. It was suggested by the district attorney on the argument, that the plaintiff in error lost the right to insist upon the defective organization of the court when the verdict was received, because her counsel did not object at the time of the reception of the verdict, on the ground that there was not a court authorized to receive it. I do not suppose it would be seriously urged that the plaintiff has lost her right to insist upon the objection to the organization of the court, if the county judge had alone proceeded to try her for the crime alleged in the indictment. It would be no more a court than if it was held by any respectable gentleman in Ontario county. Silence does not

confer jurisdiction over the subject-matter in a civil or criminal action or proceeding. Receiving the verdict was one, if not the most important of the proceedings during the trial. It must be received by the court before which the trial was had, and if not the verdict is a nullity, and not authority for the sentence. The conviction must be reversed and a new trial had in the Ontario Sessions, to which court the proceedings are remitted. The question can be there considered whether the former trial prevents a second one.

The district attorney has not considered it in his points, and we cannot consider it without he has an opportunity to be heard.

Present — MULLIN, P. J., TALCOTT and SMITH, JJ.

Conviction reversed and new trial granted in Ontario Sessions, to which proceedings are remitted.

SUPREME COURT.

General Term — New York, 1878.

SHERMAN v. THE PEOPLE.

The Court of Sessions of the county of Cayuga convicted the accused of the crime of obtaining property by false pretences.

The indictment charged that the accused obtained from one John Molley bank notes of the value of \$300, upon the false and fraudulent representations and pretences, that he brought \$50,000 ready money to Port Byron, and, that he was the owner of a house and lot in Watertown, free from incumbrance, and worth \$40,000. The indictment alleged that the accused had no ready money at Port Byron, and that said house and lot was incumbered to its full value.

The evidence on the part of the people, showed that the accused, who was a banker at Port Byron, induced the complainant by the false pretences named, to deposit currency in his bank; that the money so deposited was drawn out by the complainant some weeks afterwards; and that subsequently the complainant deposited for collection a draft, the larger part of which was unpaid when the bank closed.

The counsel for the accused moved his discharge, on the ground that no offence was shown to have been committed. The motion was overruled, and an exception taken.

Held, that the motion was properly overruled. The fact that the money deposited was paid back went to the question of intent. If the jury were satisfied by the evidence, that the deposit was induced by the false representations in the indictment, with the intent to deceive and defraud, the offence was made out. The payment may have been made in the expectation that it would further the original fraudulent design, by leading on the complainant to make other deposits, partly on the faith of the original representations.

On the trial the court received, under objection, the admission of the accused that his house and lot in Watertown were incumbered by mortgage.

Held, that this admission was error. The existence of the incumbrance was a material fact for the prosecution to prove. Without accounting for the absence of the mortgage, the record, or a certified copy, secondary evidence is not admissible. The rule is, that the admissions of a party are competent evidence, only when parol evidence of the fact sought to be shown by such admissions would be competent.

The court allowed the witness Sears to testify, under objection, that the accused said to him in June, 1876, that he brought to Port Byron \$50,000 in currency for banking purposes.

Held, that this testimony was improperly received. The testimony of Sears did not tend to prove other acts of fraud, for it did not appear that Sears was induced by such statements to do anything, or that they were made for the purpose of inducing him to do anything, or that any action on his part was contemplated when the statements were made. There is nothing in the testimony of Sears from which it can be inferred that the statements made to him were made with a fraudulent intent, and consequently they throw no light upon the *quo animo*.

F. W. Hubbard, for the accused.

S. E. Payne, district attorney, for the people.

SMITH, J.: The counsel for the plaintiff in error insists that the court below erred in refusing to instruct the jury to acquit as requested. The evidence on the part of the prosecution tended to show that Sherman, who was a banker at Port Byron, by false pretences induced the complainant to deposit currency in his bank; that the money so deposited was drawn out by the complainant and paid back to him some weeks afterward; and that subsequently he deposited a draft for collection, the larger part of which was unpaid when the bank closed. On that state of facts, it was insisted by the counsel for the defendant that no offence was committed in respect to procuring the deposit of the currency. We think the motion made on that ground was properly overruled. The fact that the money deposited was paid back went to the question of intent; and if the jury were

satisfied by the evidence that the deposit was induced by the false representations charged in the indictment, with intent to deceive and defraud, the offence was made out. The payment may have been made in the expectation that it would further the original fraudulent design, by leading on the complainant to make other deposits, partly on the faith of the original representations.

We think, however, that the court erred in receiving evidence of the admissions of the defendant that his house and lot in Watertown were incumbered by mortgage. The existence of the incumbrance was a material fact for the prosecution to prove, and the best evidence was the mortgage itself, the record, or a certified copy of the record. Without accounting for the absence of these, secondary evidence was not admissible. Verbal admissions of the defendant were no higher evidence than parol testimony of the contents of the mortgage. It seems to be the rule in this State that the admissions of a party are competent evidence, only when parol evidence of the fact sought to be shown by such admissions would be competent. In *Welland Canal Company v. Hathaway* (18 W end. 480), it was held that evidence resting in records cannot be supplied by proof of admission of the party sought to be affected by such evidence, of the existence of the facts appearing by such records. To the same effect are *Jenner v. Joliffe* (6 Johns. 9) and *Hasbrouck v. Weaver* (10 id., 246). The prosecuting attorney acknowledged the force of this rule and endeavored to comply with it by offering in evidence a certificate of the clerk of Jefferson county, tending to show the existence of a mortgage on defendant's house and lot in Watertown, but the certificate, not containing a copy of the whole of the mortgage, it was excluded. The district attorney then offered himself as a witness, and testified, under objection, that, in a certain conversation, the defendant said to him that he owned a house and lot in Watertown worth \$40,000, which was incumbered by a mortgage of \$20,000, given to trustees to secure bonds negotiated by the trustees. This, we think, was clearly inadmissible. Not only was it an attempt to prove a record by parol, but it did not profess to be evidence of the whole of the record, and so was subject to the very objection upon which the clerk's certificate had been ex-

cluded. Moreover, the admission shows that the mortgage was special in its character, and the question whether it constituted an incumbrance on the property involved an inquiry as to its legal effect, for which purpose parol evidence of admissions is never admissible.

We are also of the opinion that the testimony of the witness Sears, that the defendant said to him, in June, 1876, that he brought to Port Byron \$50,000 in currency for banking purposes, was improperly received. It was admitted, undoubtedly, upon the ground that it was competent for the prosecution to prove other like acts of fraud, at or about the same time, as evidence of the intent with which the alleged representations to the complainant were made. The rule is not questioned, but the testimony of Sears tended to establish no act. It did not appear that he was induced by the defendant's statements to do anything, or that they were made for the purpose of inducing him to do anything, or that any action whatever on his part was contemplated when the statements were made. In short, there is nothing in the testimony from which it can be inferred that the statements to Sears were made with a fraudulent intent, and consequently they do not throw light upon the *quo animo*.

For these reasons the conviction should be reversed, and a new trial ordered in the Court of Sessions of Cayuga, to which court the proceedings will be remitted.

MULLIN, P.J., and TALCOTT, J., concurred.

Ordered accordingly.

SUPREME COURT.

General Term — New York, 1878.

PRATT v. THE PEOPLE.

The accused was indicted in the Oyer and Terminer of Jefferson county, for unlawfully obstructing a public highway, or street, in the village of Carthage in said county. The indictment was sent to the Court of Sessions of Jefferson county where the accused was tried, convicted, and sentenced.

The accused erected an office and barn and piled logs and lumber within the limits of the alleged highway, and such acts constituted the obstructions.

On the trial, the following testimony was taken :

The district attorney proved that in August, 1858, Sanford Lewis, Wm. D. Lewis and Charles Sarvoy were commissioners of highways of the town of Wilna, and that a paper produced had been taken from the office of the town clerk of said town and that the signatures to said paper were in the handwriting of said commissioners. The paper produced was marked as filed Feb. 1st, 1859, in the handwriting of the then clerk of said town. That paper reads as follows: "A survey of a road or street from Furnace street to Guyot's and Davis Mills, beginning at a hub on the northerly margin of Furnace St. 25 links easterly from the point where the easterly margin of Water street intersects with the northerly margin of Furnace street, thence in a direct line towards the S-Ely corner of Guyot's gristmill N. 45½ west, 2 chs. 21 lks. to a hub 57 lks. S. 4½ E. from said S-Ely corner of said gristmill as surveyed by A. Brown, August 30th, 1858.

The above street is to be three rods wide.

SANFORD LEWIS,
WM. D. LEWIS,
CHARLES SARVOY,

Commissioners of Highways."

The signatures of the commissioners are not on the same paper as the survey, although there was room enough on that paper for their signatures, but on paper different in color and of inferior quality. This paper was annexed to the survey by three wafers.

Two of the above named commissioners swore, upon the trial of the case, that they had never signed the annexed paper when attached to the survey, and had never authorized it to be so attached, and that they had never attended a meeting of the commissioners when an order for laying out the highway was made.

The counsel for the accused asked the court to hold that from the testimony of the two commissioners and the appearance of the paper, there was no evidence to show that the *locus in quo* was a public highway. The court held that the paper was sufficient to show that the highway had been laid out. To this ruling an exception was taken.

Held, that assuming the paper found on the files of the town clerk was presumptive evidence of the laying out of the highway, it was competent for any

person interested to prove that it was not legally laid out, and thus overcome the presumption.

Held, that from the evidence of the commissioners given upon the trial, and from the appearance of the paper on which the names of the commissioners were written, the presumptive evidence of the laying out of the highway in question was entirely overcome, and the finding of the jury that the paper relied upon was an order laying out the highway, was without evidence to support it.

Held, that the paper, Exhibit A, was not a valid order for laying out the highway. It was not made in compliance with the Revised Statutes. 2 R. S., 5th ed., 394, § 70. That section reads: "whenever the commissioners of highways shall *lay out*, alter or discontinue any road, either upon application to them or otherwise, they shall cause a survey to be made of such road, and shall incorporate such survey in an order to be signed by them and to be filed and recorded in the office of the town clerk, who shall note the time of recording the same."

Held that, in this case, the survey was not incorporated in an order signed by the commissioners, and hence the requirement of the statute was not complied with. The omission to incorporate the survey in an order was fatal to the laying out of the road.

Stephen R. Pratt, for the accused.

Watson M. Rogers, for the people.

MULLIN, P. J. Assuming that the paper found on the files of the town clerk was presumptive evidence of the laying out of the highway in question, it was but presumptive evidence, and it was competent for any person interested to prove that it was not legally laid out and thus overcome the presumption.

First. The appearance of the paper was some evidence against its genuineness. The names of the commissioners were signed, not on the same paper on which the survey was written, although there was ample room on the back of it for the names of the commissioners. The paper on which the names were written was of a somewhat different color from that on which the survey was written, and was of an inferior quality, and was annexed to the survey with wafers.

Second. One of the commissioners swears positively that he never saw or heard of the survey until the day before the trial of the plaintiff in error upon the indictment, and that, although his signature to the paper is genuine, he never signed it connected with the survey, and never attended a

meeting of the commissioners when an order for laying out the highway was made.

Another of the commissioners cannot swear positively that he did not sign the paper when annexed to the survey, but has no recollection of ever signing it, and his recollection is that he did not. The third commissioner was not sworn, and we do not know what his recollection in regard to signing is. But upon the evidence given on the trial, it seems to me that the presumption is entirely overcome, and the finding of the jury that the paper relied upon was an order laying out the highway was without evidence to support it.

The only question remaining to be considered is whether the paper, Exhibit A, was a valid order laying out the road.

If I am right in holding that the verdict finding the exhibit to have been properly made and filed was not only not supported by the evidence but against it, the invalidity of the order is conclusively established. But if I am wrong in this, I am of the opinion that it is invalid as not being made in compliance with section 70, 2 Revised Statutes (5th ed.), 394, which section is in the words following, viz.:

"Whenever the commissioners of highways shall *lay out*, alter or discontinue any road, either upon application to them or otherwise, they shall cause a survey to be made of such road, and shall incorporate such survey in an order to be signed by them and to be filed and recorded in the office of the town clerk, who shall note the time of recording the same."

The survey was not incorporated in an order signed by the commissioners, and hence the requirements of the statute has never been complied with. The proper protection of the public as well as the owners or occupants of the lands over which a highway is laid out requires that the commissioners shall clearly designate the route of the road, its width and the determination that the road be laid out. The legislature, therefore, required a survey and an order signed by the commissioners, and that it be filed and made a matter of record so as to enable those interested to establish the existence of the road by the highest evidence the subject-matter was capable of being established by. If the order might be omitted so might the survey, and thus

the public left to ascertain the existence of the road by the evidence of persons cognizant of the action of the commissioners in reference to the road. I entertain no doubt but that the omission to incorporate the survey in an order was fatal to the laying out of the road.

We have been referred to the case of *Tucker v. Rankin* (15 Barb., 471), in which it was held that a survey of a road signed by the commissioners was a valid order laying out the road. The case arose in the seventh judicial district, and the appeal was heard and decided in the General Term of the district. One of the judges sitting in the General Term dissented from the conclusion at which the majority arrived as to the validity of the order, together with other questions. The dissenting opinion of JOHNSON, J., is, to my mind, conclusive against the validity of the order. The decision of the case operates as a virtual judicial repeal of the most important clause of the section cited, and is not only mischievous in its effects upon the public but fatal to the action of the public authorities in their efforts to lay out and protect the roads of their towns and the streets of their villages and cities. Although I entertain the most profound respect for the learning and ability of the judges who decided the case cited, I cannot concur with them in the conclusion at which they arrived and am constrained to disregard it.

Allen, J., when sitting in the General Term in the fifth district, in the case of *Stewart v. Wallis* (30 Barb., 348), referring to one of the propositions decided in *Tucker v. Rankin*, says "the reasons for the judgment in the former case (*Fitch v. Comrs. of Kirkland*, 22 Wend., 132), are more satisfactory to me than those of the able judge pronouncing the opinion of the court in the latter (*Tucker v. Rankin*), and, therefore, I prefer to follow the first decision."

PORTER, J., in *The People v. Williams* (36 N. Y., 443), referring to the case of *Tucker v. Rankin*, says the decision is in conflict with previous and subsequent adjudications of the court in which it was pronounced, and it has since been substantially overruled in this court.

There are other cases in which the rulings in *Tucker v. Rankin* have been repudiated, but not upon the specific point now under consideration. It seems to me that the

case cannot be considered as binding authority upon any of the questions considered by the majority of the judges.

The conviction should be reversed, and as an order laying out the road cannot now be supplied the prisoner should be discharged.

TALCOTT and SMITH, JJ., concurred on the ground that the record of the highway was impeached.

Conviction reversed and proceedings remitted to General Sessions of Jefferson county with directions for a new trial.

SUPREME COURT.

General Term — New York, 1878.

SINGER v. THE PEOPLE.

The accused was tried and convicted in the Court of General Sessions of the county of New York of the crime of assault with an attempt to commit a rape. There were two counts in the indictment, and the accused was convicted under the second count. The court was asked to charge the jury, that there could be no conviction under the second count, because the intent was not alleged to be, *carnally and unlawfully to know the child*. The court refused to charge as requested, and an exception was taken.

The second count in the indictment charged the accused with an assault upon one Statia Gluth; she then and there being a female child of the age of six years, with intent then and there in and upon her, the said Statia Gluth, by force and violence to then and there wilfully and feloniously commit a rape, against the form of the statute, etc.

Held, that the crime of rape, where the subject thereof is an infant child is, by statute, "the carnally and unlawfully knowing a female child under the age of ten years." Inasmuch as the indictment charges a felonious assault upon a female child of the age of six years, with the intent wilfully and feloniously to commit a rape, we think the facts constituting the offence are set forth with sufficient particularity.

It appeared on the trial by the testimony of the child assaulted, that she consented to the acts done by the accused, and his counsel insists that where there is consent there cannot be, in law, an assault.

Held, that a female child, under ten years of age, is incapable in law, of consenting to the act which constitutes rape under the statute, and hence, the question of consent becomes wholly immaterial on the trial of an indictment, either for the principal offence, or for an attempt to commit the crime. In changing the common law of rape, in such cases, the legislature necessarily changed the offence of assault with intent to commit the crime, so far as it could be affected by proof of consent by the infant.

W. F. Howe, for the accused.

B. K. Phelps and *Horace Russell*, for the people.

DAVIS, P. J. The prisoner was indicted for an assault with intent to commit a rape. There are two counts in the indictment; the first count charges that the prisoner, wilfully and feloniously, made an assault and battery upon Statia Gluth, she being then and there a female child, under the age of ten years, to wit, of the age of six years, with intent wilfully and feloniously to ravish and carnally know her, against the form of the statute, etc.

The second count charges an assault upon the same person; she then and there being a female child of the age of six years, with intent then and there in and upon her, the said Statia Gluth, by force and violence to then and there wilfully and feloniously commit a rape, against the form of the statute, etc.

The jury found the prisoner guilty under the second count of the indictment. The point was made on the trial, and the court was asked in substance to charge that there could be no conviction under the second count, because the intent was not alleged to be, *carnally and unlawfully to know the child*. The court overruled the point, and refused to charge as requested, and an exception was taken.

The language of the statute under which the second count of the indictment was framed, is as follows: "Every person who shall be convicted of an assault with the intent to commit any robbery, burglary, rape, manslaughter, or any other offence, punishment for which assault is not hereinbefore prescribed, shall be punished by imprisonment in a State prison for a term not exceeding five years, or in a county jail not exceeding one year, or by a fine not exceeding \$500, or both such fine and imprisonment." (2 R. S., 666, § 39; 3 id. [6th ed.], 938, § 49). We think that under this statute the offence was sufficiently charged in the second count of the indictment.

The charge is, that the prisoner, "with force and arms, in and upon the said Statia Gluth, she the said Statia Gluth being then and there a female child under the age of ten years, to wit, of the age of six years, wilfully and feloni-

ously made an assault with intent then and there in and upon her, the said Statia Gluth, by force and violence to then and there wilfully and feloniously to commit a rape, against the form of the statute," etc. The crime of rape, where the subject thereof is an infant child, is, by statute, "the carnally and unlawfully knowing a female child under the age of ten years." Inasmuch as the indictment charges a felonious assault upon a female child of the age of six years, with the intent wilfully and feloniously to commit a rape, we think the facts constituting the offence are set forth with sufficient particularity. It would perhaps be better pleading in such a case to allege the intent to have been to carnally and unlawfully know a female child under the age of ten years; yet that was not necessary, although the proof must establish the intent to have been to accomplish an act within the description of the statute. The statute in relation to the assault uses the word "rape," and it seems to us only necessary, in connection with that word, to specify the circumstances of the crime charged in such manner that the accused cannot be misled in respect to the matters intended to be proved; and that is fully accomplished by the count of the indictment in question.

The child in this case testified to her own age, stating that she was between six and seven years; and no point was made on the trial as to the sufficiency of this evidence. Further proof could readily have been supplied if any question had been suggested, and for that reason it is not competent now to object to the sufficiency of the proof on that subject.

It appeared by her testimony that the child consented to the acts done by the prisoner, and it is insisted that where there is consent there cannot be an assault in law. This point is completely covered by the case of *Hays v. The People* (1 Hill, 351). In that case the prisoner was indicted and convicted of an assault with intent to commit a rape upon a female child under ten years of age, and the court held that "the assent of such an infant being void as to the principal crime, is equally so in respect to the incipient advances of the offender. That the infant consented to, or even aided in the prisoner's attempt, cannot therefore, as in the case of an adult, be alleged in his favor,

any more than if he had consummated his purpose." A female child, under ten years of age, is incapable in law of consenting to the act which constitutes rape under the statute, and hence the question of consent becomes wholly immaterial on the trial of an indictment either for the principal offence, or for an attempt to commit the crime. The absence of consent is not an element in the crime of rape when committed under ten years of age, and its presence is wholly immaterial. It is illogical therefore to say that the presence of consent is material when the offence charged is an assault with intent to commit a crime in which that element is in every sense immaterial. In changing the common law of rape in such cases, we think the legislature have necessarily changed the offence of assault with intent to commit that crime, so far as it could be affected by proof of consent by the infant.

In this case the child, in giving her testimony, made statements which if received and credited precisely as given, tended to establish that the crime of rape was actually perpetrated. The court was asked by the prisoner's counsel to charge that if anything was proved it was rape, and that the prisoner could not be convicted of the crime charged in the indictment because the principal offence was proved to have been committed. The court held that the jury had a right to find upon the evidence a lesser offence than that of rape, and that it was for the jury to say if the offence charged in the indictment had been sustained.

The court was not asked to instruct the jury, that if they found that a rape was actually perpetrated there could be no conviction under the statute for an assault with intent to commit that crime; but the request was in substance that the case be wholly taken away from the jury upon the evidence, the court determining that the crime of rape was as a matter of fact, established by the evidence. We think under the circumstances of the case that it was no error for the court to decline to do this. The jury had the child before them. They had proof of her age, and were entitled to judge from her manner and appearance, and the description which she gave of what occurred, whether or not she intended to testify, and whether she knew, that the alleged intent of the prisoner was so fully consummated, as to con-

stitute the crime of rape. She stated facts also, quite inconsistent with the idea of the complete penetration of her person which she seemed to think had taken place ; and the extreme youth of the child and all the surrounding circumstances as described by herself and the other girl who was present, seem to us to have justified the jury in finding that nothing more than an attempt to have carnal connection was committed. We do not see in the case any substantial error that would justify us in interfering with the conviction and judgment.

The judgment should, therefore, be affirmed.

BRADY and INGALLS, JJ., concurred.

Judgment affirmed.

NOTE.—The Penal Code, now in force, defines rape as follows :

“§ 278. Rape is an act of sexual intercourse with a female not the wife of the perpetrator, committed against her will or without her consent. A person perpetrating such an act, or an act of sexual intercourse with a female not his wife,

“1. When the female is under the age of ten years ; or,

“2. When through idiocy, imbecility or any unsoundness of mind, either temporary or permanent, she is incapable of giving consent ; or,

“3. When her resistance is forcibly overcome ; or,

“4. When her resistance is prevented by fear of immediate and great bodily harm, which she has reasonable cause to believe will be inflicted upon her ; or,

“5. When her resistance is prevented by stupor or by weakness of mind produced by an intoxicating narcotic, or anesthetic agent, administered by, or with the privity of, the defendant ; or,

“6. When she is, at the time, unconscious of the nature of the act, and this is known to the defendant, is punishable by imprisonment for not less than five nor more than twenty years.

“§ 279. No conviction for rape can be had against one who was under the age of fourteen years, at the time of the act alleged, unless his physical ability to accomplish penetration is proved as an independent fact, beyond a reasonable doubt.

“§ 280. Any sexual penetration, however slight, is sufficient to complete the crime.”

By the same Code assaults are defined as follows :

"§ 217. A person who, with an intent to kill a human being, or to commit a felony upon the person or property of the one assaulted, or of another,

"1. Assaults another with a loaded firearm, or any other deadly weapon, or by any other means or force likely to produce death ; or,

"2. Administers to, or causes to be administered to or taken by another, poison, or any other destructive or noxious thing, so as to endanger the life of such other,

"Is guilty of assault in the first degree.

"§ 218. A person who, under circumstances not amounting to the crime specified in the last section :

"1. With intent to injure, unlawfully administers to, or causes to be administered to, or taken by another, poison, or any other destructive or noxious thing, or any drug or medicine, the use of which is dangerous to life or health ; or,

"2. With intent thereby to enable or assist himself or any other person to commit any crime, administers to, or causes to be administered to, or taken by another, chloroform, ether, laudanum, or any other intoxicating narcotic or anesthetic agent ; or,

"3. Wilfully and wrongfully wounds or inflicts grievous bodily harm upon another, either with or without a weapon ; or,

"4. Wilfully and wrongfully assaults another by the use of a weapon, or other instrument or thing likely to produce grievous bodily harm ; or,

"5. Assaults another with intent to commit a felony, or to prevent or resist the execution of any lawful process or mandate of any court or officer, or the lawful apprehension or detention of himself, or of any other person,

"Is guilty of an assault in the second degree.

"§ 219. A person who commits an assault, or an assault and battery, not such as is specified in the foregoing sections of this chapter, is guilty of assault in the third degree."

Ed.

SUPREME COURT.

General Term—New York, 1878.

STONE, AND ANOTHER, v. THE PEOPLE.

The accused were indicted at the Orleans Oyer and Terminer for a conspiracy to cheat and defraud one Marcia A. McIlrath. They were tried and convicted in the Court of General Sessions of the same county.

The counsel for the accused insists, that the indictment is defective inasmuch as it does not allege that they conspired to get from the complainant more than the tobacco was worth; and that it was not worth twenty cents a pound, the price paid by the complainant.

Held, that it was of no consequence what the tobacco was worth, the crime consisted in the fact that Stone and Black confederated together to get from the complainant five cents more a pound than they were entitled to, and to divide that amount between them. The indictment contains the only allegation required to describe the offence.

On the trial, in order to prove the conspiracy between the accused, the district attorney, under objection, was allowed to put in evidence the minutes of a justice of the peace, before whom Stone was examined, after his arrest for the conspiracy of the accused to defraud complainant. The examination was had in February, 1876, and the transaction in reference to the tobacco was closed before the 10th of November, 1875, as at that time the whole of this tobacco was paid for by the complainant.

The counsel for the accused objected to the reception of this evidence, on the ground that the statements offered were not a part of the *res gesta* and, therefore, the deposition of Black was not evidence against Stone, nor that of Stone against Black.

Held, that without the deposition of Stone, Black could not have been convicted, and the deposition of Stone was incompetent as evidence against Black, for it was given long after the accused had ceased to act in furtherance of the purposes of the conspiracy. For the same reasons the deposition of Black was not evidence against Stone.

S. E. Filkins, for the accused.

H. A. Childs, for the people.

MULLIN, P. J.: The defendants were indicted in the Orleans Oyer and Terminer for a conspiracy to cheat and defraud Marcia A. McIlrath. The indictment was sent to the Sessions of that county and the prisoners were tried

therein in November, 1876. The case made by the evidence on the part of the prosecution is this :

In 1875, Mrs. McIlrath was engaged in the manufacture of cigars in Erie, Penn., and employed the prisoner, Stone, to go east and buy tobacco for her ; he went, and on his return told her that he could get Black's tobacco at fifteen cents per pound. She told him to go back and take Black's whole crop at that price, provided Black would give credit for part. Afterwards Stone wrote her that the price of tobacco had gone up to twenty cents per pound and that he had bought the tobacco at that price. She then sent Black a draft for \$510, the price of 2,550 pounds of the tobacco that was first delivered and received. Stone went to Erie and saw complainant and told her that Black would wait four months for the balance of the price of the tobacco, if she would give him her note for \$100, to be forfeited if she did not take the balance of the tobacco ; she gave the note and finally received and paid for the balance of the tobacco at twenty cents per pound. The business with Black was finally closed on the 10th of November, 1875. Black informed Mrs. McIlrath in the winter of 1875-6, that Stone had charged her more for the tobacco than he had paid, and that he (Black) had paid Stone eighty dollars out of the money received from her. He had agreed to pay Stone \$110 out of the money received for the tobacco if he should sell it for twenty cents per pound. It was only demanded because he had to wait longer for his money than it was understood he should do. Stone bought of Black 2,550 pounds at fifteen cents, Black claiming it was worth more, told Stone he would make it all right with him, if he (Stone) should get more for it. Stone told him all he wanted was his travelling expenses ; if he (Black) would give him forty or fifty dollars for the 2,550 pounds he would give him twenty cents per pound and fifteen for the residue. He told Mrs. McIlrath that she should have the rest of the tobacco at twenty cents. Black said to Stone, that he (Stone) had got to have something out of it as well as him (Black).

The first point of the counsel for the plaintiff in error is, that it is not alleged in the indictment, that the plaintiffs in error conspired together, to get from Mrs. McIlrath more

than the tobacco was worth, nor that it was not worth twenty cents per pound. Stone agreed for the purchase of the tobacco at fifteen cents per pound. Mrs. McIlrath was entitled to receive it at that price, but Stone and Black confederated together to get from her five cents per pound more, and to divide that amount between them. It was of no consequence what the tobacco was worth, honesty and fair dealing required that Mrs. McIlrath should have the tobacco for the price agreed upon. The indictment contains the only allegation required to describe the offence.

The prosecution, in order to prove that the plaintiffs conspired together to defraud Mrs. McIlrath, offered in evidence the minutes of a justice of the peace before whom Stone was examined, after his arrest for the conspiracy of the plaintiffs in error to defraud Mrs. McIlrath.

The examination was had in February, 1876, and the transaction in reference to the tobacco was closed before the 10th of November, 1875, as at that time the whole of this tobacco was paid for by Mrs. McIlrath. The counsel for the plaintiffs in error objected to the reception of this evidence, on the ground that the statements offered were not a part of the *res gestæ* and therefore the deposition of Black was not evidence against Stone, nor that of Stone against Black; the objection was overruled and the counsel excepted.

Without the deposition of Stone, Black, the plaintiff in error, could not have been convicted. By Black's own evidence it was proved that he did not know that Stone was purchasing for another, and he made a bargain with him to pay him one-half the difference between fifteen and twenty cents per pound, if he should effect a sale of it at twenty cents, and he denied that he sold the tobacco for fifteen cents.

The deposition of Stone was incompetent as evidence against Black. (1 Cow. & Hill's Notes, 177, 179; 1 Greenleaf's Ev., §§ 110, 111; *The People v. Davis*, 56 N. Y., 95.) The evidence was given long after the plaintiffs in error had ceased to act in furtherance of the purposes of the conspiracy. For the same reasons the deposition of Black was not evidence against Stone.

It is unnecessary to examine any other of the exceptions

taken on the trial. Judgment must be reversed because of the admission of the depositions.

Judgment reversed and new trial granted in the Orleans Sessions, to which court the proceedings are remitted.

Present — MULLIN, P. J., TALCOTT and SMITH, JJ.

Conviction and judgment reversed, and new trial ordered in Orleans County Sessions, and proceedings remitted to that court.

INDEX.

ABORTION.

1. The accused was tried and convicted in the Court of Sessions of the Peace, in and for the county of Kings, and, upon a general verdict of guilty, the court sentenced the prisoner to the penitentiary for the term of ten years. The prisoner was convicted under the Laws of 1872, in relation to abortions. The first two counts of the indictment were under the first section, and the third count under the third section of that act. The prisoner pleaded not guilty to the whole indictment, and did not ask the court at the trial to compel the district attorney to elect upon which count or counts in the indictment the trial should proceed. At the close of the evidence on both sides, the counsel for the defendant, asked the court to acquit the accused under each count. The court declined, and an exception was taken. The court charged the jury that a general verdict of guilty would cover all the counts, but that if they should find the prisoner guilty only under the third count, their verdict should be "guilty under the third count." After the return of a general verdict of guilty, by the jury, the prisoner's counsel moved in arrest of judgment, which was denied and the prisoner was sentenced. The objection raised was, that the indictment was defective inasmuch as it charged two distinct felonies, one under the first section, and one under the third section of the statute.

Held, that the objection is not well founded. All the counts are under the same statute, and relate to the same transaction. In such a case it matters not that the offence alleged to have been committed is charged in different ways in several counts for the purpose of meeting the evidence that may be adduced. And it matters not that the offences alleged in the different counts are of different grades, and call for different punishments. Burglary with an attempt to commit larceny, with a count for larceny; burglary and larceny; rape and an assault with an attempt to commit rape; larceny and receiving stolen goods; assault with intent to kill and a simple assault may be united, and it matters not that the offences thus united call for different punishments; so long as all the counts relate to the same transaction.

There was an objection made that there was no proof that the child was living at the time of the operation.

Held, that the evidence in the case shows that the doctress who saw the fetus a few hours after it was brought into the world, gave it as her belief, as an expert, that it was then alive. The case on this point was rested on her evidence, and we cannot say that there was no evidence on the subject. *Hacker v. The People*, 524.

ARSON.

1. The prisoner was indicted and convicted of arson in the first degree, in setting fire to certain dwelling-houses in the village of Canastota, to the number of thirty-five. On the trial the people elected to proceed as to one house only, and that was the house of Mary H. Parker.

Held, that it was proper to indict the prisoner as for one offence, and, provided the destruction of every house amounted to the same degree of arson, the indictment need contain but one count. Regarding the entire fire as one transaction, the burning, condition, situation and occupancy of the several houses, were simply matters of detail.

A motion by the prisoner's counsel was made to quash the indictment, and in arrest of judgment, on the ground that the indictment did not state there was some human being in each dwelling-house at the time the houses were fired or burned.

Held, that the first degree of arson requires the presence of some human being in the dwelling-house at the time the prisoner sets fire to or burns it. The statute describes the crime to be, "willfully setting fire to, or burning, in the night time, a dwelling-house in which there shall be, at the time, some human being." *Held*, further, that a fair construction of the words employed in the indictment, charge the presence of a human being in each of the houses, at the time they were burned. *Woodford v. The People*, 123.

ASSAULT.

1. The prisoner was a policeman, and, while in a state of intoxication, assaulted the prosecutor without cause and beat him with his club. At the close of the trial the prisoner requested the court to charge that the prisoner could not be convicted, under the indictment, for an assault with a sharp dangerous weapon, with intent to do bodily harm, and this was conceded by the district attorney. The court made no ruling upon it.

Held, that it was erroneous as a legal question, but the error is not available because: 1st. It was the request of the prisoner's counsel. 2d. The court made no ruling upon it. 3d. There was no exception.

The counsel for the prisoner requested the court to charge the jury that, before they could convict the prisoner of an assault with intent to kill, they must be satisfied upon the evidence that, had death ensued, the prisoner would be guilty of murder in the second degree. This request was refused, and exception taken.

Held, that as the crime charged was an assault with intent to kill, and that in his charge the judge distinctly told the jury that it was indispensable to a conviction of the principal offence to find that the prisoner intended to kill the prosecutor, and gave the jury detailed instructions as to the rules of evidence applicable to the offence, and as there was no exception to any part of the charge, it must be assumed that the jury found the necessary intent, consequently there was no error.

Held, also, that when the instructions of the court are unexceptionable as to the offence charged and for which the prisoner is on trial, and such instructions cover every element of the crime, and correct rules for the proper application

of the evidence, it is not strictly the right of a prisoner to ask instructions upon a hypothetical case, based upon other facts, but all that the prisoner can legally ask is, that the court shall correctly charge the jury as to the crime for which he is being tried.

The prisoner's counsel requested the court to instruct the jury, that, in order to convict, they must specifically find that the prisoner would have been guilty of murder in the second degree, if death had ensued. This request was refused.

Held, no error. This request excluded the hypothesis of murder in the first degree, and implied that in such an event the prisoner could not have been convicted. *Slattery v. The People*, 99.

2. The prisoner was indicted, tried and convicted at a Court of Sessions of Columbia County, of an assault with a deadly weapon with intent to kill.

The accused worked for Son, the complainant, and lived in a dwelling house belonging to him. The agreement between the accused and complainant was that Kerrains was to work for Son for a year, if they could agree; Son to pay thirteen shillings per day, and to furnish Kerrains with a house, the prisoner to work at whatever the former had for him to do. Kerrains worked for Son until the latter part of June, 1871, when Son asked him to "haul the bleach," which he refused to do. Son then discharged him, paid him up, and told him to leave the premises or he would throw his things out. The prisoner refused, and did not leave. Son with two men went to the house occupied by Kerrains, in his absence, and commenced removing Kerrains' furniture. Kerrains was sent for by his wife—he returned, saw what Son was doing, picked up an axe, went into the house and ordered Son and his men out. Son refused to go, presented a pistol, when an altercation occurred and Kerrains struck Son with the axe, inflicting an injury.

On the trial Kerrains was sworn in his own behalf and was asked the following question: "What was your intention in taking the axe from the shed to the house?" The question was objected to and the objection sustained.

The court charged the jury that the prisoner occupied the house as a servant, and not as a tenant; and, therefore, the prosecutor had the legal possession.

Held, that if the relation of master and servant existed it would follow that the legal possession of the house was in the prosecutor, and he had the legal right to remove the furniture and goods therein, and to employ the necessary force for that purpose, and that the defendant would not be justified in using force to prevent it. The question depends upon the nature of the holding, whether it is exclusive and independent of, and in no way connected with the service, or whether it is so connected, or is necessary for its performance. From the facts in this case, the court decided correctly, that the defendant occupied as a servant, and not as a tenant.

Held, that the court, in sustaining the objection of the prosecution to the question, "What was your intention in taking the axe from the shed to the house?" committed an error. The intent to kill was indispensable to be established by the prosecution, it constituted the vital element of the offence, and although it is true that the time when that intent must exist was when the blow was struck, yet it was competent for the defendant to testify to any fact tending to disprove such intent. It is a fact to be established, and, of course, may be repelled. The rule is, following *McKown v. Hunter*, 30 N. Y., 625, that when the motive

of a witness in performing a particular act, or making a particular declaration, becomes a material issue in a cause, or reflects important light upon such issue, he may himself be sworn in regard to it, notwithstanding the difficulty of furnishing contradictory evidence, and notwithstanding the diminished credit to which his testimony may be entitled as coming from the mouth of an interested witness. *Kerrains v. The People*, 102.

8. The defendant was convicted before the Court of General Sessions, of the city and county of New York, of an assault with intent to kill, or to do bodily harm. The defence was justification.

On the trial the court asked the question: "Evers, can you explain to me this thing; while Curran, that was able to whip you, kept picking at you for amusement, why should he have put his hand in his pocket after giving you three terrific licks in the face? what was the occasion for drawing a pistol?" To which the prisoner's counsel duly excepted.

Held, that the question excepted to was objectionable. The Recorder seems to have been impressed with the conviction that the complainant being the conqueror, it was absurd in him to resort to a weapon; but that was for the jury to determine, not upon the reasons or opinions of the defendant, but upon the facts and circumstances disclosed. We cannot say that the question did not do the prisoner any injury, and, upon well settled principles of evidence, that is sufficient to demand a reversal of the judgment. *Evers v. The People*, 127.

4. The prisoner was convicted upon the third count of the indictment which charged him with committing an assault and battery with intent to kill, by such means or force as was likely to produce death. It is claimed that the conviction cannot be sustained, because that count contains no averment that the assault was "with a deadly weapon."

Held, that the statute upon which the third count of the indictment is drawn, is by no means limited to assaults and batteries with intent to kill, by means of any "deadly weapon," that is only one of the alternatives of the provision; the other is an assault and battery, with like intent, by such means and force as was likely to produce death. The latter offence is accurately and particularly set forth in the count.

The court charged the jury: "And here let me remind you that the complainant testified (and that you may consider an important piece of evidence), that when he was walking along and heard this stealthy step behind him, the street appeared to be deserted. You will recollect the time—it was on the fifth of August; you won't forget the place—it was the Fifth avenue; you have a right, of your own knowledge, to take notice of the circumstance that at that time, the fifth of August, no part of the city was probably more likely to be deserted, even as early in the night as nine o'clock, than that part of the avenue," to the last sentence of which the counsel for the prisoner excepted.

Held, that the exception was well taken. The condition of the street, as to whether deserted or not, at the time and place described, was a fact to be proved, like other circumstances in the case, and whether a certain street in a large city is likely to be deserted at nine o'clock in the evening, is clearly not within the rule of evidence which justifies a judicial notice of that fact. *Lenahan v. The People*, 134.

5. The accused was convicted of a felonious assault upon one Taylor, with a

pitchfork, a sharp, dangerous weapon. The offence alleged was created by chapter 74, of the Laws of 1854.

It appeared on the trial that a controversy existed between Filkins, the accused, and one Carpenter in respect to several mules. Filkins claimed them in right of, and as agent or bailee of his wife, the general owner. Carpenter claiming a lien upon them for their keeping. Filkins was the tenant in possession of the premises, and thus in actual possession of the mules. The mules had been kept by Carpenter, under an agreement with Filkins, and there were several hundred dollars due in arrears for their keeping. At the time of the affray, during which the alleged assault was made upon Taylor, Carpenter had, in the absence of Filkins, gone to the barn with men and boys, including Taylor, with the intention of taking possession of and removing the mules by force. Filkins came upon the ground and discovering what was being done opposed force by force, and the assault alleged was the result. Filkins found Taylor in the act of taking one of the mules from the stall, and with a pitchfork which he had in his hand struck him twice on or over the head. The blow was made as with a club and not by pushing or thrusting with the tines.

Held, that as used the weapon was not a sharp and dangerous one, and not within the statute.

On the trial the accused offered to prove the ownership and his possession of the mules. The evidence was excluded. It was further offered by the accused, to prove that Carpenter with the complainant were trespassing, and that the accused was only endeavoring to protect his property. The court rejected the offer. The judge was asked if he still persisted in his ruling out evidence of the ownership of the property, to show a right to resist, and a justification in the use of force, and he replied that he did persist in so ruling. To each of these rulings and decisions there was a distinct and several exception.

Held, that in the exclusion of this evidence, there was manifest error. The right of property and to the possession of the mules was at the foundation of a justification or excuse for any assault, or the resort to any violence or force to prevent their removal. The assault upon Taylor was professedly in defence of property, and the affray grew out of the rival claims of the contestants. The proof offered was competent to enable the jury to determine who was the aggressor, and whether the force used was justified. If the intention was merely to defend the possession of the goods, and there was no malicious intent, the offence was not within the statute of 1854. *Filkins v. The People*, 311.

6. The defendant was convicted, in the Court of Sessions of the county of Rensselaer, upon an indictment charging him with a felonious assault upon one John H. O'Brien, with a sharp, dangerous weapon, with intent to do bodily harm, and without justifiable or excusable cause, and the verdict of the jury was "guilty of the felony whereof he was charged." The defendant was sentenced to the State prison, for a term of five years. After the sentence the prisoner, upon the indictment, evidence, proceedings in the trial, and upon affidavits, moved the court for a new trial upon the merits, and upon the ground of surprise and newly discovered evidence, and also upon the ground, that the sentence and conviction were erroneous, illegal, excessive and against the evidence and the weight of evidence. This motion was denied. The prisoner then obtained a writ of error and a writ of *certiorari*, and the record and all the proceedings upon the motion for a new trial were returned to the Supreme Court,

where the judgment of the Sessions was affirmed. The prisoner on a writ of error comes into this court.

Held, that the writ of *certiorari*, only brought the proceedings upon the motion for a new trial before the Supreme Court for review, and there its office ceased. The writ of error for review in this court does not bring those proceedings with it; they are no part of the record.

Held, that the conviction was obtained under the act of 1854, as the indictment alleges that the instrument used was "sharp, dangerous," that the assault was made with intent "to do bodily harm," and that it was "without justifiable or excusable cause." These allegations were all necessary under the act of 1854 but not under the act of 1866. Whether the instrument used in the commission of the crime was sharp or not was matter of proof as alleged, upon the trial. It is sufficient, to uphold the indictment, that at least one of the instruments mentioned in the statute and alleged in the indictment, was commonly known as sharp. The jury were correctly charged that they could not convict the prisoner unless they found the instrument used was sharp and dangerous.

The court refused to charge that "if the jury can satisfactorily account for the wound on O'Brien's head in any other manner than by an assault by the prisoner with such a weapon as is named in the indictment, it is their duty to acquit the prisoner," but did charge that they might or might not convict him of simple assault and battery.

Held, that in this there was no error. In an indictment for assault and battery it is not necessary to specify any instrument with which the crime was committed; and if the instrument be specified it is mere surplusage which may be disregarded, and need not be proved upon the trial. Hence, the prisoner could have been convicted of a simple assault and battery, even if the jury had found that he did not use either of the instruments specified in that indictment.

On the trial the accused was sworn in his own behalf, and upon cross-examination the counsel for the people was permitted, under objection, to question him as to other altercations in which he had been engaged, and other assaults which he had committed.

Held, that this permission was not objectionable. When a prisoner offers himself as a witness, in his own behalf, he is subject to the same rules upon cross-examination as other witnesses. He may be asked questions disclosing his past life and conduct, and thus impairing his credibility. The extent to which such an examination may go to test the witness' credibility is largely in the discretion of the trial court. In *The People v. Irving*, 2 N. Y. Crim. Rep., 171, that principle was recited and affirmed. *The People v. Casey*, 371.

ASSAULT AND BATTERY.

1. The accused was indicted for the crime of assault and battery, and, on a plea of guilty, was sentenced by the Court of Sessions of Richmond county, "to be imprisoned in the Kings county penitentiary, for the term of six months."

The accused claimed that the sentence was unlawful, because the place of imprisonment named by the court was not the county jail of Richmond county.

The General Term in the second judicial department, affirmed the judgment of the Court of Sessions, and the accused brought error

Held, that by the act of 1874, it is made lawful for the several boards of supervisors in this State to agree with any county, having a penitentiary therein, to receive into it, and there keep, any person sentenced to confinement for a term not less than sixty days. After notice that such agreement had been made, this law made it the duty of the courts of the counties so agreeing, whenever they sentenced a prisoner for a term not less than sixty days, if it was not a State prison offence, to sentence him to a penitentiary so agreed upon.

Held, that the Legislature had the power to designate a place of imprisonment in a part of the State other than the county jail of the county where the offence was tried. Though the Revised Statutes prescribe the county jail as the place of imprisonment for those guilty of certain misdemeanors, the Legislature is not restricted thereby, but may provide by law for another place and different institution within the State. *Brown v. The People*, 516.

BIGAMY.

1. The accused was tried and convicted at the Rensselaer Court of Sessions for bigamy, in having married in Washington county while the wife of a former marriage was still living, etc. The second marriage was on the 12th of March, 1875, and the indictment was found the 26th of the same month, and it alleged the apprehension of the accused in Rensselaer county on the 23d day of March of that year. After the arrest of the accused on the 23d of March he escaped and was re-arrested in Vermont on the 26th of March, 1875. The objection is taken, that the Rensselaer county courts had no jurisdiction to indict under these facts.

Held, that the statute provides that an indictment may be found "in the county in which such person shall be apprehended." The actual arrest, before indictment found, gives jurisdiction; the escape does not take it away; nor discharge on bail destroy jurisdiction once acquired. If apprehended in the county where the indictment is afterward found, he may be there tried as if the offence had been committed there. The evidence that the defendant was arrested in Rensselaer county, is sufficient to satisfy the statute.

After the trial of this case had proceeded for a time, it was found that the accused had not been arraigned or asked to plead to the indictment. He was then arraigned and the indictment read to him. The defendant objected to any further proceedings being taken, which was overruled, and he plead not guilty. The accused again objected to any further proceedings, when the court discharged the trial jury. Afterward, upon a further prosecution of the indictment, the accused set up the former impanelling, trial and discharge of jury, as a bar to a further trial. That issue, upon this plea, was tried, and, by the direction of the court, the jury rendered a verdict against such plea, to which the accused excepted.

Held, that such partial trial, without arraignment or pleading, and such discharge of the jury, so irregularly impanelled, upon the objection of the defendant to any proceeding in the case, do not constitute legal jeopardy whereby the defendant was exempted from further prosecution upon the same indictment.

Held, that the constitutional provisions forbidding that any person be subject for the same offence to be twice put in jeopardy has been construed to mean by

the courts of the United States, Massachusetts and New York, that there must have been a final verdict of conviction or acquittal upon a valid indictment.

See foot note, at the end of this case. *Ah King v. The People*, 429.

BILL OF EXCEPTIONS.

1. The prisoner was tried for perjury, at the Court of Sessions held in Washington county, by the county judge of Saratoga county, and the justices of the Sessions of Washington county. It appears that the judges who signed the bill of exceptions were not members of the court when the trial was had. A bill of exceptions was proposed on behalf of the defendant, and amendments thereto proposed by the district attorney, and such proposed bill and amendments were submitted to the judge who presided at the trial and he certified in what manner the exceptions should be settled, and the judge of Washington county adopted the papers thus certified as the bill of exceptions in the case.

Held, that it was competent for the parties to consent to the settlement, although they were different persons from those who sat upon the trial. *Wood v. The People*, 116.

2. See note as to exceptions now taken and settled, 131.

3. The General Term of the First Department denied a motion for a mandamus to compel the Court of Oyer and Terminer, to settle and seal a proposed bill of exceptions. The bill of exceptions was presented to the court for settlement, but they declined to proceed on the ground that the defendant is still a "fugitive at large, and beyond the control and without the power of the authorities of this State, he having made his escape and absconded from their custody after his conviction, and while awaiting the action of the court upon it."

Held, that an escaped prisoner cannot take any action before the court. The whole theory of criminal proceedings is based upon the idea of the defendant being in the power, and under the control of the court, in his person. The provisions of the statutes, giving to defendants in criminal cases the right to make a bill of exceptions, are not so absolute as to displace all the other principles which belong to criminal proceeding, but must be taken in subordination to them. *The People v. Genet*, 157.

4. The accused was indicted for murder, tried and convicted of murder in the first degree, at the Erie Oyer and Terminer, and sentenced to be hanged on the 21st day of June, 1878, between the hours of ten o'clock A.M. and two o'clock P.M. The accused obtained a writ of error to the General Term, in the fourth department, with a stay of proceedings upon the judgment. A bill of exceptions to the decisions of the trial court was settled, signed and sealed and filed with the clerk of the court. A return to the writ was made and certified to by the clerk which contained a transcript of the indictment, bill of exceptions, and sentence of the court. From the clerk's certificate it appeared that no record of the judgment on such conviction had been signed and filed. It appears from the bill of exceptions that certain exceptions to the decisions of the trial court were made, which might have been passed upon by the General Term, but that court did not pass upon them. The General Term considered the writ and return, and the matters contained therein, and determined to dismiss the writ of error on the ground that the return did not show any record of any final judgment of the Oyer and Terminer against the plaintiff in error. For that cause

the writ was dismissed, and the proceedings were ordered remitted to the Oyer and Terminer of Erie County with directions to fix another day for the execution of the sentence against him. This action of the General Term is brought here for review.

Held, that a judgment of a General Term dismissing a writ of error without either affirming or reversing the judgment of the trial court, if there was no power to dismiss the writ, is a final judgment.

Held, that the General Term gave as its reason for dismissing the writ, that the return does not show any record of any final judgment of the Oyer and Terminer.

Held, that this statement is susceptible of two interpretations. One, that though there is a record returned, it does not appear that a final judgment was rendered. Another, that though there was a final judgment, it does not appear that a formal record thereof was made up and returned.

Held further, that whichever is the correct understanding of the order, the court erred.

Held, that it appears from the return, that the plaintiff in error was duly tried and convicted, by the verdict of a jury, of murder in the first degree; and the sentence of death by hanging, on a day certain, between two hours of that day, was passed upon him by the court of Oyer and Terminer, in which he was tried. This was a final judgment. The sentence given by the court is the judgment rendered by it.

Held, that the return in this case, was made in compliance with the statutory provisions, and it was error to dismiss the writ without looking into the bill of exceptions, or other matter in the return to ascertain if errors existed. The plaintiff in error had procured a return to his writ, which contained all of which the statute required the clerk to make return. By a dismissal of it and a remitting of the proceedings, with directions to fix another day for the execution of the sentence, the plaintiff in error lost the benefit of his writ. The sentence of the Oyer and Terminer, was the judgment of the court which the writ of error brought up for review.

Held, that the General Term was not confined to the matter returned to the writ of error. It might, on motion of the district attorney, or of the plaintiff in error, or at its own suggestion, have directed a writ of *certiorari* to bring before it whatever there was of record in the case, not contained in the return to the writ of error.

Held, that one tried on an indictment, and convicted by the verdict of a jury, and sentenced by the court, may obtain and file a bill of exceptions and sue out a writ of error. On a return of the clerk thereto, made in accordance with the statute, he may move the court to review the errors alleged by him. If they, or any of them, are such as that the matter contained in the return will necessarily show them, the writ of error may not be dismissed, for the reason that the return does not present a complete and formal record of the judgment and proceedings of the trial court. Such as it does present, the matter for determining must be passed upon. But if errors are alleged to the court, which may or may not have occurred, and they not be shown by the matter in the return, the court may entertain a motion by the defendants in error, or plaintiff in error, or of its own motion direct, that a writ of *certiorari* issue to the trial court, so that all may be brought up which the records of that court contain, relating to the case. And it matters not whether the record or roll thereof has

been made up before or after the writ of error sued out by the plaintiff in error, or before the writ of *certiorari* is directed, or after that. Whatever took place in the trial court which was matter proper for record, may as well after as before be incorporated in a roll and returned. *Maule v. The People*, 498.

BURGLARY.

1. The prisoner was indicted for burglary in the third degree, in breaking and entering a store in the night time, and stealing therefrom certain goods kept there for sale.

On the trial it was shown that the scuttle of the store had been forced open, and the lock of the back door had been burst open, through which the presumption was that the burglars had entered.

Held, that this evidence established the burglary.

Among the articles missed from the store in the morning, when the burglary and theft were discovered, was a quantity of cigars, not mentioned in the indictment, that had disappeared with the articles which were set forth, and proof, under objection, was allowed of the fact.

Held, that it was a part of the same act which constituted the crime charged, and admissible as a circumstance showing its nature and extent.

A box of burglar tools, found in the office of Adams Express Company, at Boston, shortly after the burglary, was produced and identified at the trial. It was shown that the box, containing the tools, had been made for the prisoner; had been taken to the prisoner's residence, and sent away from there in an express wagon. The box was marked Foster, and the prisoner was present at the express office when it was found there.

This evidence was objected to on the ground that the box was in no way proven to be connected with the prisoner.

Held, that, in view of the evidence given upon the subject, and the form of the objection, the reception of the evidence was not error.

After the box and contents were received in evidence, objection was made to a witness giving the names of the articles in the box, and a motion was made, after its reception, to strike out such evidence.

Held, that no error was committed in the receiving, or refusing to strike out the evidence objected to. By the form of the objection, it was conceded that the box and its contents were proper evidence, if the prisoner had been sufficiently shown to have been connected with them. After this concession, and the box and its contents were received in evidence, it was too late to allow the motion to strike out the evidence to prevail. *Foster v. The People*, 132.

2. The accused was indicted for the crime of burglary and larceny. The indictment contained three counts: Burglary in the second degree; burglary in the third degree and larceny. It was charged that the prisoner entered the house of one Hinckley Cole with the intent to commit a crime; to wit, the crime of larceny. The intent alleged was to steal cider.

The jury rendered a general verdict of guilty.

The facts proved upon the trial were as follows: The accused with his brother and another person, stopped at the house of the prosecutor, who was absent from

home. The accused was, at the time, partially intoxicated. He had before stopped at the same house and procured cider. The daughter of the prosecutor came to the door, and when the accused asked for cider and offered to pay for it, she refused to let him have any. The prisoner said he would have some cider anyway, and started to go down cellar. The daughter forbade him, and ordered him to leave the premises, but he went into the cellar and drew some cider in a pail. The brother of the accused followed him into the cellar, took the cider from him and got him away from the premises. There were two doors to the cellar, one opening out of and the other opening into the cellar. The evidence on the part of the prosecution was, that the door opening into the cellar was shut and latched. The prisoner's counsel asked the court to direct an acquittal, which request was refused.

Held, that if the prisoner unlatched the cellar door on entering, there was a breaking and entry which would constitute one element of burglary.

Held, that the material question in the case is, whether the evidence justified the finding of the jury that the prisoner broke and entered the cellar with intent to steal cider therein. If the evidence was insufficient to show that it was done with intent to commit a larceny, the judge should have directed an acquittal. There must have been a felonious intent, for without it there was no crime.

Held, further, that in this case there was neither fraud, stratagem or stealth; the whole transaction was open, in the day time, and in the presence or within the observation and knowledge of the prosecutor's daughter. To find the transaction a larceny it is necessary to override the ordinary presumption of innocence and to reject a construction of the prisoner's conduct which accounts for all the circumstances proved without imputing crime, and to impute a criminal intention, in the absence of the ear-marks which ordinarily attend and characterize it. *McCourt v. The People*, 232.

3. The accused was convicted of burglary in the third degree, by the Court of General Sessions in and for the city and county of New York.

Before the grand jury, by whom the accused was indicted, was sworn, his counsel interposed a challenge to the array, on the grounds that Douglas Taylor, who was legally elected and who qualified as commissioner of jurors did not select the grand jury nor was such jury selected by any one authorized by him; that they were illegally selected by one Thomas Dunlap, who had been appointed in the place of said Taylor by the Mayor, and that the act of the legislature, under which the Mayor acted, was unconstitutional, to which the district attorney demurred, and the demurrer was sustained. On the trial the counsel for the prisoner challenged the array of the petit jurors upon the same grounds. This challenge was demurred to, and the demurrer sustained.

Held, that the challenge to the array of grand jurors was properly disallowed. The Revised Statutes do not allow such a challenge.

Held also, that the challenge to the array of petit jurors was properly disallowed. On the face of the challenge it appeared Thomas Dunlap who selected the petit jurors had been appointed commissioner of jurors and was, therefore, a *de facto* officer.

Held further, that the validity of the appointment of Dunlap could not be drawn in question in this collateral manner. *Carpenter v. The People*, 279.

4. The accused was tried for burglary in the first degree, in the Court of Sessions of Richmond county, and he was convicted. The Supreme Court of the second judicial district confirmed the judgment and the accused brought error.

The indictment alleged that the accused broke and entered, in the night time, "the dwelling-house of Frederick Kohnsen and John F. Lubkin, being copartners in business under the firm name and style of Kohnsen & Lubkin." The crime as defined by the Revised Statutes consists, in breaking into, and entering in the night time, in the manner there specified, the dwelling-house of another, in which there is at the time some human being, with the intent to commit some crime therein. The evidence showed the breaking and entering, and the criminal intent.

Held, that the questions to be decided are, first, whether it is legally proper, in an indictment for burglary of a dwelling-house, to aver the ownership in a partnership and, second, whether the proof showed that the room entered was a dwelling-house within the intent of the statute.

Held, as to the first point, that according to numerous and clear authorities, the ownership of the dwelling-house may be laid in the indictment to be in the members of a copartnership, where the facts of the case warrant it.

Held, as to the second point, that the definition of the crime of burglary given by the statute, does not differ from the definition of the crime of burglary at common law, and at common law it had been held that it was not needful that there should be an internal communication between the room or building in which the owner dwelt, if the two rooms or building were in the same inclosure, and were built close to and adjoining each other. Where the room or building entered, was under the same roof with the building or room occupied for sleeping in, it is part of the dwelling-house within the statutory or common law definition of burglary.

Held, that where different stores in a large building, some parts of which are used for sleeping apartments, and are rented to different persons for purposes of trade or commerce, or mechanical pursuit, or manufacturing, another rule comes in. That rule is, that a part of a dwelling-house may be so severed from the rest of it, by being let to a tenant, as to be no longer a place in which burglary in the first degree can be committed, if there be no internal communication, and the tenant does not sleep in it. Then it is not parcel of the dwelling-house of the owner, for he has no occupation or possession of it; nor is it a dwelling-house of the tenant, for he does not lodge there. *Quinn v. The People*, 831.

CERTIORARI.

1. The prisoners were convicted before the Court of Special Sessions of the Peace in the city of New York, of keeping a disorderly house.

The question came up on a writ of certiorari.

The return to the writ stated that the relators were brought before a committing magistrate, and that they thereupon elected to be tried by the Court of Special Sessions.

Held, that such election waived all objections to the jurisdiction of the court.

At the close of the trial, and after the prisoners had been convicted and sen-

tenced, their counsel desired the court to note an appeal to the Court of General Sessions, for a rehearing of the case.

Held, that such a question does not properly arise upon *certiorari*. Such writ brings up only the proceedings to and including, but not subsequent to judgment, so that the only question to be determined is, whether any error has been shown, such as would justify a reversal of the judgment. *Gill v. The People*, 93.

2. The Code of Criminal Procedure has abolished the writ of *certiorari*, and substituted an appeal, as the only mode of reviewing a criminal judgment. See section 515 of the Code which reads as follows :

"§ 515. Writs of error and of *certiorari*, in criminal actions and proceedings and special proceedings of a criminal nature as they have heretofore existed, are abolished ; and hereafter the only mode of reviewing a judgment or order in a criminal action or proceeding of a criminal nature, is by appeal."

3. The defendant was convicted, in the Court of Sessions of the county of Rensselaer, upon an indictment charging him with a felonious assault upon one John H. O'Brien, with a sharp, dangerous weapon, with intent to do bodily harm, and without justifiable or excusable cause, and the verdict of the jury was "guilty of the felony whereof he was charged." The defendant was sentenced to the State prison, for a term of five years. After the sentence the prisoner, upon the indictment, evidence, proceedings in the trial, and upon affidavits, moved the court for a new trial upon the merits, and upon the ground of surprise and newly discovered evidence, and also upon the ground, that the sentence and conviction were erroneous, illegal, excessive and against the evidence and the weight of evidence. This motion was denied. The prisoner then obtained a writ of error and a writ of *certiorari*, and the record and all the proceedings upon the motion for a new trial were returned to the Supreme Court, where the judgment of the Sessions was affirmed. The prisoner on a writ of error comes into this court.

Held, that the writ of *certiorari*, only brought the proceedings upon the motion for a new trial before the Supreme Court, for review, and there its office ceased. The writ of error for review in this court does not bring those proceedings with it ; they are no part of the record. *People v. Casey*, 371.

CONVICTION.

1. The defendant was convicted of grand larceny after a former conviction for the same crime.

Held, that the former conviction and discharge must be alleged in the indictment, and must be proved on the trial and passed upon by the jury. A more severe penalty is denounced by the statute for a second offence ; and all the facts to bring the case within the statute must be established on the trial. The objection that such evidence may affect the prisoner's character has no force when such evidence relates to the issue to be tried.

Held, that, as there was no evidence that the prisoner had been discharged or pardoned, as the statute requires, except by the fact that sufficient time had elapsed to enable the prisoner to serve out his sentence, if the point had been raised in the court below, and decided adversely, following *Wood v. The People*,

1 Cowen's Crim. Rep., 554, the point would have been available. *Johnson v. The People*, 48.

2. At the time of the conviction of the prisoner, for murder, he was serving out a term of imprisonment in a State prison, which had not expired. He makes the claim that he could not be hung before the expiration of his term.

Held, that this claim is without foundation. To hold otherwise would give a life convict unlimited license to murder without further punishment. Beside the statute requires, in the case of murder in the first degree, the court to proceed and pass sentence, which must be executed in not less than four nor more than eight weeks thereafter, and whether this law is directory or mandatory, it is the duty of the court to obey it. *Thomas v. The People*, 293.

3. Error to the Supreme Court of Washington Territory.

The accused had escaped and was not actually or constructively within the control of the court.

Held, that it was within the discretion of the court to hear a criminal case, where the convicted party was not within its control and where he cannot be made to respond to any judgment which the court might render. *Smith v. The United States*, 466.

CONSPIRACY.

1. *Held*, that a conspiracy may be proved, as other facts are proved, by circumstantial evidence, and parties performing disconnected overt acts, all contributing to the same result and the consummation of the same offence, may, by the circumstances and their general connection or otherwise, be satisfactorily shown to be conspirators and confederates in the commission of the offence. If there was evidence to justify the conclusion that the parties were all acting with a common purpose and a common design, and although there may have been no previous combination or confederacy to commit this particular offence, the conduct and actions of the several parties, and the parts they severally performed in the actual perpetration of the crime, was sufficient to make the acts and declarations of each, from the commencement to the consummation of the offence, evidence against the others. The declarations were not given in evidence to prove the guilt of the parties on trial, and as the declarations of one conspirator against another, but as a part of the *res gestæ*, a part of the history of the transaction, and as such it was competent. *Kelly v. The People*, 30.

2. The counsel for the accused excepted to the ruling of the court admitting evidence of the statement of the deceased, in the absence of the accused, as to what was done at the doctor's office upon the occasion of a ride she took with him. This ruling is sought to be sustained upon the ground, first, that it was part of the *res gestæ*; and second, that it was competent as the act or declaration of a co-conspirator, while engaged in the purpose of the conspiracy. The case shows that the deceased, in company of the prisoner, left her residence in his buggy, and was absent several hours; that he brought her back, and she came into the house; that the prisoner did not come in; that immediately after she came in, in answer to inquiries from her step-mother, she made the statement in question, telling what had been done by the doctor at his office, and how he did it, and exhibited certain medicine which she said the doctor gave, and stated what he told her as to taking it when her pains came on. In this case

the thing done, or *res gesta*, was at the doctor's office in another town; and it is clear that its narration by the deceased was no part of that thing. Anything said accompanying the performance of an act, explanatory thereof or showing its purpose or intention, when material, is competent as a part of the act. (1 Greenleaf's Evidence, 129, §§ 108, 108a, 109 and notes.)

But when the declarations offered are merely narratives of past occurrences, they are incompetent. (*Id.*, § 110.) That is precisely this case. The declarations given in evidence were a mere statement of what had been done at the doctor's office, and not any part of what was then done, and therefore no part of the *res gesta*. The question is, did the proposed declaration accompany the act or was it so connected therewith as to constitute a part of it. If so, it is a part of the *res gesta*, and competent; otherwise, not.

It is insisted that the statement was competent, as being the declaration of a co-conspirator. The evidence was such as to warrant the conclusion that the prisoner and the deceased had agreed or conspired together to procure the miscarriage of the latter; that in the prosecution of this purpose they went away from the residence of the deceased together, in the buggy of the prisoner. The general rule is, that when sufficient proof of a conspiracy has been given to establish the fact *prima facie* in the opinion of the judge, the acts and declarations of each conspirator in the furtherance of the common object are competent evidence against all. But to make the declaration competent it must have been made in the furtherance of the prosecution of the common object, or constitute a part of the *res gesta* of some act done for that purpose. A mere relation of something already done for the accomplishment of the object of the conspirators is not competent evidence against the others. The means to produce the miscarriage, upon the theory of the prosecution, had already been applied. There remained nothing further to be done to effect this object. The conspiracy was therefore ended. Had it been shown that the medicine was to be taken to aid in producing the miscarriage, what was said in respect to it would have been admissible. This was not shown, and the entire statement was inadmissible. *The People v. Davis*, 39.

3. The accused were indicted and convicted of conspiring together to neglect an official duty required by chapter 491 of the Laws of 1871.

The defendants were commissioners of charities of the county of Kings and they were charged with conspiring together in purchasing supplies without awarding a contract therefor, contrary to section 3 of chapter 491, Laws of 1871. They were also charged with official misconduct. Of this charge they were acquitted, and convicted of conspiracy.

The prosecution proved that the defendants purchased in open market and without previous advertisement the articles described in the indictment. Evidence was given by the defendants showing that they did not at the time know of the existence of the statute or that it was their duty to advertise, and that they acted in good faith following the practice theretofore established in the department.

The counsel for the defendants requested the court to charge the jury that they must find a corrupt intent in order to convict the defendants, and, that if they acted in the honest belief that the law did not require them to advertise for proposals, the jury could not convict. This request was not only refused but the judge charged the jury, that ignorance of law, or an absence of an

intent to violate it, would not avail the defendants ; and if they did the act prohibited, or omitted to do what was required, they were guilty.

Held, that to constitute crime there must not only be the act but also the criminal intention ; and these must concur, the latter being equally essential with the former. To make an agreement between two or more persons to do an act innocent in itself a criminal conspiracy, it is not enough that it appears that the act which was the object of the agreement was prohibited. The confederation must be corrupt. The agreement must have been entered into with an evil purpose, as distinguished from a purpose simply to do the act prohibited in ignorance of the prohibition. Mere concert is not conspiracy. The actual criminal intention belongs to the definition of the offence, and must be shown to justify a conviction for conspiracy. *The People v. Powell*, 283.

4. The defendants were tried in the Circuit Court of the United States for the District of Louisiana, on an indictment for conspiracy under the sixth section of the act of May 30, 1870, known as the Enforcement act. The indictment contained thirty-two counts and three of the defendants were found guilty under the first sixteen counts, and not guilty under the remaining counts. The general charge in the first eight counts is that of "banding," and in the second eight, that of "conspiring" together to injure, oppress, threaten, and intimidate Levi Nelson and Alexander Tillman, citizens of the United States, of African descent and persons of color, with the intent thereby to hinder and prevent them in their free exercise and enjoyment of rights and privileges "granted and secured" to them "in common with all other good citizens of the United States by the constitution and laws of the United States."

The parties convicted moved in arrest of judgment on the following grounds :

1. Because the matters and things set forth and charged in the several counts, one to sixteen inclusive, do not constitute offences against the laws of the United States, and do not come within the purview, true intent, and meaning of the act of Congress, approved 31st of May, 1870, entitled "*An Act to enforce the rights of citizens of the United States*," &c.

2. Because, &c. &c., do not constitute offences cognizable in the Circuit Court, and do not come within its powers and jurisdiction.

3. Because the offences created by the sixth section of the act of Congress referred to, and upon which section the aforesaid sixteen counts are based, are not constitutionally within the jurisdiction of the courts of the United States, and because the matters and things therein referred to are judicially cognizable by State tribunals only, and legislative action thereon is among the constitutional reserved rights of the several States.

4. Because the said act, in so far as it creates offences and impose penalties, is in violation of the Constitution of the United States, and an infringement of the rights of the several States and the people.

5. Because the eighth and sixteenth counts of the indictment are too vague, general, insufficient, and uncertain, to afford the accused proper notice to plead and prepare their defence, and set forth no specific offence under the law.

6. Because the verdict of the jury against the defendants is not warranted or supported by law.

On this motion the opinion of the judges were divided and at the instance of

the United States the case comes up on the certificate of this division of opinion. The certificate states the question to be, whether "the said sixteen counts of said indictment are severally good and sufficient in law, and contain charges of criminal matter indictable under the laws of the United States."

This certificate presents the question whether this indictment, based upon section 6 of the Enforcement Act of May 31, 1870, is sufficient in law and contains charges of criminal matter indictable under the laws of the United States.

Section six reads as follows:—"That if two or more persons shall band or conspire together, or go in disguise upon the public highway, or upon the premises of another, with an intent to violate any provision of this act, or to injure, oppress, threaten, or intimidate any citizen, with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the constitution or laws of the United States, or because of his having exercised the same, such persons shall be held guilty of felony, and, on conviction thereof, shall be fined or imprisoned, or both, at the discretion of the court,—the fine not to exceed \$5,000, and the imprisonment not to exceed ten years; and shall, moreover, be thereafter ineligible to, and disabled from holding, any office or place of honor, profit, or trust created by the constitution or laws of the United States." 16 Stat. 141.

Held, that the general charge in the first eight counts is that of "banding," and in the second eight, that of "conspiring" together to injure, oppress, threaten, and intimidate Levi Nelson and Alexander Tillman, citizens of the United States, of African descent and persons of color, with the intent thereby to hinder and prevent them in their free exercise and enjoyment of rights and privileges "granted and secured" to them "in common with all other good citizens of the United States by the constitution and laws of the United States."

Held, that the offences provided for by the statute in question do not consist in the mere "banding" or "conspiring" of two or more persons together, but in their banding or conspiring with the intent, or for any of the purposes specified. To bring this case under the operation of the statute, therefore, it must appear that the right, the enjoyment of which the conspirators intended to hinder or prevent, was one granted or secured by the constitution or laws of the United States. If it does not so appear, the criminal matter charged has not been made indictable by any act of Congress.

Held, that the government of the United States is one of delegated powers alone. Its authority is defined and limited by the Constitution. All powers not granted to it by that instrument are reserved to the States or the people. No rights can be acquired under the constitution or laws of the United States, except such as the government of the United States has the authority to grant or secure. All that cannot be so granted or secured are left under the protection of the States.

Held, that the first and ninth counts of the indictment state the intent of the defendants to have been to hinder and prevent the citizens named, in the free exercise and enjoyment of their "lawful right and privilege to peaceably assemble with each other and with other citizens of the United States for a peaceful and lawful purpose." The right of the people peaceably to assemble for lawful purposes existed long before the adoption of the Constitution of the United States. In fact, it is, and always has been, one of the attributes of citizenship under a free government. It "derives its source from those laws whose authority is acknowledged by civilized man throughout the world." It is found wherever

civilization exists. It is not, therefore, a right granted to the people by the Constitution. The government of the United States when established found it in existence, with the obligation on the part of the States to afford it protection. As no direct power over it was granted to Congress, it remains subject to State jurisdiction.

Held, that the particular amendment of the Constitution now under consideration assumes the existence of the right of the people to assemble for lawful purposes, and protects it against encroachment by Congress. The right was not created by the amendment; neither was its continuance guaranteed, except as against congressional interference. For their protection in its enjoyment, therefore, the people must look to the States. The power for that purpose was originally placed there, and it has never been surrendered to the United States.

Held, that if it had been alleged in these counts, that the object of the defendants was to prevent a meeting for such a purpose, the case would have been within the statute, and within the scope of the sovereignty of the United States. Such, however, is not the case. The offence, as stated in the indictment, will be made out, if it be shown that the object of the conspiracy was to prevent a meeting for any lawful purpose whatever.

Held, that the second and tenth counts are equally defective. The right there specified is that of "bearing arms for a lawful purpose." This is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The second amendment declares that it shall not be infringed; but this, as has been seen, means no more than that it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the national government, leaving the people to look for their protection against any violation by their fellow citizens of the rights it recognizes, to what is called the "powers which relate to merely municipal legislation, or what was, perhaps, more properly called, internal police," "not surrendered or restrained" by the Constitution of the United States.

Held, that the third and eleventh counts are even more objectionable. They charge the intent to have been to deprive the citizens named, they being in Louisiana, "of their respective several lives and liberty of person without due process of law." This is nothing else than alleging a conspiracy to falsely imprison or murder citizens of the United States, being within the territorial jurisdiction of the State of Louisiana. The rights of life and personal liberty are natural rights of man. "To secure these rights," says the Declaration of Independence, "governments are instituted among men, deriving their just powers from the consent of the governed." The very highest duty of the States, when they entered into the Union under the Constitution, was to protect all persons within their boundaries in the enjoyment of these "unalienable rights with which they were endowed by their Creator." Sovereignty, for this purpose, rests alone with the States. It is no more the duty or within the power of the United States to punish for a conspiracy to falsely imprison or murder within a State, than it would be to punish for false imprisonment for murder itself. The fourteenth amendment prohibits a State from depriving any person of life, liberty, or property, without due process of law; but this adds nothing to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the States upon the fundamental rights which belong to every citizen as a member of society. It secures "the individual from the arbitrary exercise of the powers of government,

unrestrained by the established principles of private rights and distributive justice." These counts in the indictment do not call for the exercise of any of the powers conferred by this provision in the amendment.

Held, that the fourth and twelfth counts charge the intent to have been to prevent and hinder the citizens named, who were of African descent and persons of color, in "the free exercise and enjoyment of their several right and privilege to the full and equal benefit of all laws and proceedings, then and there, before that time, enacted or ordained by the said State of Louisiana and by the United States; and then and there, at that time, being in force in the said State and District of Louisiana aforesaid, for the security of their respective persons and property, then and there, at that time enjoyed at and within said State and District of Louisiana by white persons, being citizens, of said State of Louisiana and the United States, for the protection of the persons and property of said white citizens." There is no allegation that this was done because of the race or color of the persons conspired against. The case as presented amounts to nothing more than that the defendants conspired to prevent certain citizens of the United States, being within the State of Louisiana, from enjoying the equal protection of the laws of the State and of the United States.

Held, that the fourteenth amendment prohibits a State from denying to any person within its jurisdiction the equal protection of the laws; but this provision does not, any more than the one which precedes it, add anything to the rights which one citizen has under the Constitution against another. The duty of protecting the equality of the rights of citizens was originally assumed by the States; and it still remains there. The only obligation resting upon the United States is to see that the States do not deny the right. This the amendment guarantees, but no more.

Held, that the sixth and fourteenth counts state the intent of the defendants to have been to hinder and prevent the citizens named, being of African descent, and colored, "in the free exercise and enjoyment of their several and respective right and privilege to vote at any election to be thereafter by law had and held by the people in and of the said State of Louisiana, or by the people of and in the parish of Grant aforesaid." Inasmuch, therefore, as it does not appear in these counts that the intent of the defendants was to prevent these parties from exercising their right to vote on their race, &c., it does not appear that it was their intent to interfere with any right granted or secured by the constitution or laws of the United States. One may suspect that race was the cause of the hostility; but it is not so averred. This is material to a description of the substance of the offence, and cannot be supplied by implication. Every thing essential must be charged positively, and not inferentially. The defect here is not in form, but in substance.

Held, that the seventh and fifteenth counts are no better than the sixth and fourteenth. The intent charged is to put the parties named in great fear of bodily harm, and to injure and oppress them, because, being and having been in all things qualified, they had voted "at an election before that time had and held according to law by the people of the said State of Louisiana, in said State, to wit, on the fourth day of November, A.D. 1872, and at divers other elections by the people of the State, also before that time had and held according to law." There is nothing to show that the elections voted at were any other than State elections, or that the conspiracy was formed on account of the race of the parties against whom the conspirators were to act. The charge as made is really nothing more than a conspiracy to commit a breach of the peace within a State.

Certainly it will not be claimed that the United States have the power or are required to do mere police duty in the States. If a State cannot protect itself against domestic violence, the United States may, upon the call of the executive, where the legislature cannot be convened, lend their assistance for that purpose. This is a guaranty of the Constitution ; but it applies to no case like this.

Held, that the first, second, third, fourth, sixth, seventh, ninth, tenth, eleventh, twelfth, fourteenth, and fifteenth counts do not contain charges of a criminal nature made indictable under the laws of the United States, and are not good and sufficient in law. They do not show that it was the intent of the defendants, by their conspiracy, to hinder or prevent the enjoyment of any right granted or secured by the Constitution.

Held, that the intent charged in the fifth and thirteenth is "to hinder and prevent the parties in their respective free exercise and enjoyment of the rights, privileges, immunities, and protection granted and secured to them respectively as citizens of the United States, and as citizens of said State of Louisiana," "for the reason that they, * * * being then and there citizens of said State and of the United States, were persons of African descent and race, and persons of color, and not white citizens thereof ;" and in the eighth and sixteenth, to hinder and prevent them "in their several and respective free exercise and enjoyment of every, each, all, and singular the several rights and privileges granted and secured to them by the constitution and laws of the United States." The same general statement of the rights to be interfered with is found in the fifth and thirteenth counts.

Held, that the question here is whether the offence has here been described at all. These counts in the indictment charge, in substance, that the intent in this case was to hinder and prevent these citizens in the free exercise and enjoyment of "every, each, all, and singular" the rights granted them by the Constitution, &c. There is no specification of any particular right.

Held, that in criminal cases, prosecuted under the laws of the United States, the accused has the constitutional right "to be informed of the nature and cause of the accusation." The indictment must set forth the offence "with clearness and all necessary certainty, to apprise the accused of the crime with which he stands charged, and every ingredient of which the offence is composed, must be accurately and clearly alleged. It is an elementary principle of criminal pleading, that where the definition of an offence, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offence in the same generic terms as in the definition ; but it must state the species,—it must amount to particulars. A crime is made up of acts and intent ; and these must be set forth in the indictment, with reasonable particularity of time, place, and circumstances. The indictment should state the particulars, to inform the court as well as the accused.

Held, that these counts are too vague and general. They lack the certainty and precision required by the established rules of pleading, and they are not good and sufficient in law. *United States v. Cruikshank*, 400.

5. The accused were indicted at the Orleans Oyer and Terminer for a conspiracy to cheat and defraud one Marcia A. McIlrath. They were tried and convicted in the Court of General Sessions of the same county.

The counsel for the accused insists, that the indictment is defective inas-

much as it does not allege that they conspired to get from the complainant more than the tobacco was worth ; and that it was not worth twenty cents per pound, the price paid by the complainant.

Held, that it was of no consequence what the tobacco was worth, the crime consisted in the fact that Stone and Black confederated together to get from the complainant five cents more a pound than they were entitled to, and to divide that amount between them. The indictment contains the only allegation required to describe the offence.

On the trial, in order to prove the conspiracy between the accused, the district attorney, under objection, was allowed to put in evidence the minutes of a justice of the peace, before whom Stone was examined, after his arrest for the conspiracy of the accused to defraud complainant. The examination was had in February, 1876, and the transaction in reference to the tobacco was closed before the 10th of November, 1875, as at that time the whole of this tobacco was paid for by the complainant.

The counsel for the accused objected to the reception of this evidence, on the ground that the statements offered were not a part of the *res gestæ* and, therefore, the deposition of Black was not evidence against Stone, nor that of Stone against Black.

Held, that without the deposition of Stone, Black could not have been convicted, and the deposition of Stone was incompetent as evidence against Black, for it was given long after the accused had ceased to act in furtherance of the purposes of the conspiracy. For the same reasons the deposition of Black was not evidence against Stone. *Stone v. The People*, 553.

CONSTITUTION.

1. The defendant was indicted for selling sixty thousand bags of Java coffee as a broker, without having given the bond required by the statute of 1846, amended by the Laws of 1866.

The exaction from the broker of the fees or duties required by the law of 1866, is claimed to be an interference with commerce, and to be a tax or duty, upon imports, and so in violation of the constitutional provisions of section 13 of article 7 of the Constitution of the State of New York, and of the Constitution of the United States. (Art. 1, § 8, subd. 3 ; § 10, subd. 2.)

Held, That the principles to be extracted from adjudicated cases are as follows :

1. That the power of regulating commerce with foreign nations, and among the States, and the power of taxing imports or exports, belongs to Congress exclusively.

2. That Congress has no power to interfere with the internal traffic of a State. That authority is vested in the State alone.

3. That imported property, while remaining in the hands of the importer in its original form, cannot be taxed by State authority.

4. That when it leaves the importer's hands, and becomes incorporated with the general mass of the property of the country, it becomes subject to State taxation.

5. That taxation to sell in any form an article of import, intended for sale,

or upon the necessary instrument of exporting an article intended for export, is a taxation upon the article itself, and not permitted by the Federal constitution.

6. That the imposition by a State of a tax upon a particular kind of business is constitutional, although the subject-matter of the business relates entirely to dealing with foreign countries. *The People v. Moring*, 1.

2. The prisoner was convicted of petit larceny, by the Court of Special Sessions of the Peace in and for the county of New York. The court of special sessions was held by three persons appointed police justices under the provisions of the act, chap. 538, Laws of 1873.

It is insisted by the counsel for the prisoner that the appointment of police justices is provided for in art. 6, § 18, of the State Constitution, adopted in 1870, in the words: "Justices of the peace and District Court justices shall be elected in the different cities of this State, in such manner, and with such powers, and for such terms, respectively, as shall be prescribed by law."

Held, that among the principles to be applied in the construction of constitutions is the principle, that the makers of such instruments and the people who have adopted them must be deemed to have employed words in their natural sense, and to have intended what they said.

Held, that, applying this principle, there is nothing in the subject-matter or the context either to require or to warrant the court from departing from the plain sense and import of the terms used. By justices of the peace were not meant officers having part only of the authority of justices of the peace—that is, their civil jurisdiction only, but it included their criminal jurisdiction as well.

Held, that police justices in the city of New York are not included by the terms justices of the peace in cities, as used in the section of the Constitution in question, but that those officers may rightfully be appointed, as provided in the act of 1873.

Held, that the title of the act in question expresses that the bill is a local one and that it does not embrace more than one subject; and that all of the provisions of the statute relates to the same subject, and all are essential to work out the legitimate purpose of the law—the securing better administration in the courts mentioned in the act. *Wenzler v. The People*, 73.

3. The prisoner was convicted by the City Court of Long Island City, of burglary, and sentenced to be imprisoned in the State prison, at hard labor, for the term of seven years and six months.

It is claimed that the court before which the prisoner was tried, was not legally constituted.

The court was created by chapter 460, of the Laws of 1871, and the act is entitled, "An act to revise the charter of Long Island City."

Held, that the constitutional provision contained in the sixteenth section of article 3, of the Constitution, has not been disregarded. It is plain, that an act creating a municipality, and giving to it necessary legislative, taxing, judicial and police powers, embraces but one subject, and the separate provisions of such an act defining and granting these powers are but parts of a whole, and essential to make a whole.

Held, that the object of the constitutional provision was two-fold : to prevent the joining of one local subject to another or others of the same kind, or to one or more general subjects, so that each should gather votes for all ; and to advise the public, and the locality, and the representatives of the locality, and of other parts, of the general purpose of the bill, so that those interested might be on their guard as to the whole or as to the details. The act in question did not go counter to that object, and its title was in obedience to it. *Harris v. The People*, 113.

4. This was an appeal from an order of the General Term of the Supreme Court, affirming an order of Special Term, which denied a motion of defendant, to vacate a judgment entered on a forfeited criminal recognizance. The judgment was perfected under chapter 315, of the Laws of 1844. The record consisted of the recognizance and certified copy of the order forfeiting the same.

The defendant urges as a ground for vacating the judgment, that the summary method of perfecting such a judgment upon forfeited recognizances, authorized by the laws of 1844 and 1861, is in direct contravention of the fundamental doctrine embodied in the State Constitution, that "no person shall be deprived of life, liberty or property, without due process of law."

Held, that the defendant is not in a situation to take this objection. By the recognizance the defendant acknowledged an indebtedness, subject to a defeasance, and consented that upon failure to perform the condition, the debt should become absolute, and judgment perfected thereon, and that execution might issue as upon other judgments for the recovery of a sum certain. The cognizors waived their right to any day in court other than that given them by the terms of the recognizance, and that day was had accordingly.

The defendant further says that the judgment was taken in disregard of the constitutional provision, preserving inviolate the trial by jury in all cases in which it has been heretofore used.

Held, that the right to a trial by jury, was waived by the terms of the recognizance and assent of the cognizors, and in all civil proceedings the right of a trial by jury may be waived. But the proceedings for judgments were not suits at common law, but a special statutory proceeding, summary in its character and unknown to the common law, and therefore not within the provision of the Constitution invoked by the defendants. *The People v. Quigg*, 182.

5. After the trial of this case had proceeded for a time, it was found that the accused had not been arraigned or asked to plead to the indictment. He was then arraigned and the indictment read to him. The defendant objected to any further proceedings being taken, which was overruled, and he plead not guilty. The accused again objected to any further proceedings, when the court discharged the trial jury. Afterward, upon a further prosecution of the indictment, the accused set up the impanelling, trial and discharge of jury, as a bar to a further trial. That issue, upon this plea, was tried, and, by the direction of the court, the jury rendered a verdict against such plea, to which the accused excepted.

Held, that such partial trial, without arraignment or pleading, and such discharge of the jury, so irregularly impanelled, upon the objection of the defendant to any proceeding in the case, do not constitute legal jeopardy whereby the defendant was exempted from further prosecution upon the same indictment.

Held, that the constitutional provisions forbidding that any person be subject for the same offence to be twice put in jeopardy has been construed to mean by the courts of the United States, Massachusetts and New York, that there must have been a final verdict of conviction or acquittal upon a valid indictment.

See foot note at the end of this case. *Ah King v. The People*, 429.

6. The judges of the Circuit Court of the United States for the Southern District of New York, certified their division of opinion in this case.

The defendant was indicted in the Circuit Court for the Southern District of New York, for an alleged offence against the United States, described in the ninth subdivision of section 5132 of the Revised Statutes. All of that statute applicable to this case reads as follows: "every person respecting whom proceedings in bankruptcy are commenced, either upon his own petition or that of a creditor," who, within three months before their commencement, "under the false color and pretence of carrying on business, and dealing in the ordinary course of trade, obtains on credit from any person any goods or chattels with intent to defraud," shall be punished by imprisonment for a period not exceeding three years.

The indictment charged the defendant with having, within three months previous to the commencement of his proceedings in bankruptcy, purchased and obtained on credit goods from several merchants in the city of New York, upon the pretence and representation of carrying on business and dealing in the ordinary course of trade as a manufacturer of clothing; whereas he was not carrying on business in the ordinary course of trade as such manufacturer, but was selling goods to some parties by the piece for cost, and to other parties at auction for less than cost, and that these pretences and representations were made to defraud the parties from whom the goods were purchased.

Upon the trial the defendant was convicted, and on motion in arrest of judgment, the Court were opposed in opinion and they certified the question upon which they differed as follows:—"If a person shall engage in a transaction which, at the time of its occurrence, is not a violation of any law of the United States, to wit, the obtaining goods upon credit by false pretences, and if, subsequently thereto, proceedings in bankruptcy shall be commenced respecting him, is it within the constitutional limits of congressional legislation to subject him to punishment for such transaction considered in connection with the proceedings in bankruptcy?"

Held, that an act which is not an offence at the time it is committed cannot become such by any subsequent independent act of the party with which it has no connection. The criminal intent essential to the commission of a public offence must exist when the act complained of is done: it cannot be imputed to a party from a subsequent independent transaction.

Held, that the act described in the ninth subdivision of section 5132 of the Revised Statutes is one which concerns only the State in which it is committed: it does not concern the United States.

Held, that the answer to the question certified must be in the negative. *United States v. Fox*, 476.

COURTS.

1. *Held*, that the true rule and the only rule that can be sustained upon principle is, that the intendment of law is, that an error in the admission of evidence is prejudicial to the party objecting, and will be ground for the reversal of the judgment unless the intendment is clearly repelled by the record. The error must be shown conclusively to be innoxious. It is not enough that the appellate court may be of the opinion that the result ought to, and probably would, have been the same if the objectionable evidence had been excluded, and especially ought not such a presumption avail to cure an error upon a criminal trial. *Coleman v. The People*, 18.

2. Where the judge, who is called to the witness box, is actually trying the cause, and his continuance in the action as judge is necessary to the seemly and proper trial of the cause, then he may not become a witness; it is error so to do, and if objection be made, and exception taken, it is fatal error. If a judge is put upon the stand as a witness, he has all the rights of a witness, and he is subject to all the duties and liabilities of a witness. It may chance, that he may for reasons sufficient for himself, but not sufficient for another of equal authority in the court, decline to answer a question put to him, or in some other way bring himself in conflict with the court. Who shall decide what course shall be taken with him? Shall he return to the bench and take part in disposing of the interlocutory question thus arising, and upon the decision being made, go back to the stand, or go into custody for contempt? The first would be unseemly, if not unlawful, for it would be passing judicially upon his own case. The last would disorganize the court and suspend its proceedings. Other like results may be conceived as possible, equally as contrary to the good conduct of judicial proceedings. Therefore the inclination of the courts has been to hold, that when it is necessary for the conduct of the trial that one should act as judge, he may not be called from the bench to be examined as a witness; but when his action as a judge is not required, because there is a sufficient court without him, he may become a witness, though it is then decent that he should not return to the bench. In the case here, the justice of the Sessions, who was examined as a witness was a necessary part of the court, without whose continued presence and assisting action it would have been broken up. It was erroneous for him to become a witness in the case. *The People v. Dohring*, 141.

3. The court for the trial of the prisoner was organized by there being upon the bench the circuit judge, the county judge of Washington county, and the two justices of the peace, designated as justices of the Sessions of said county. Several days were devoted to the taking of evidence, and an adjournment was had over Sunday. On Monday, when the court re-assembled, *Justice Steere* was absent. The trial proceeded and evidence was taken on Monday, and on Tuesday *Justice Steere* returned and resumed his seat upon the bench, joined the court, and took part in its deliberations during the subsequent part of the trial.

Held, that the participation of *Justice Steere* in the trial after his absence from the court-house, while the whole of Monday's evidence was given, was against the provision of the law and Constitution giving a jury trial before a regularly constituted court, the members of which should hear all the evidence and proceedings. *Shaw v. The People*, 200.

4. The accused was charged with the murder of his wife by administering to her corrosive sublimate. The prisoner was tried by a Court of Oyer and Terminer. At the commencement of the trial, there were upon the bench a justice of the Supreme Court, Hon. A. D. Waite, county judge of Washington county, and two justices of the Sessions, Lyle and Steere. After several days of session, Justice Steere left the court and did not return until two days after. After the charge to the jury had been delivered by the presiding judge, Judge Waite left the court and was not present when the jury came in and rendered their verdict.

Held, that when Justice Steere left, a competent court remained, but his absence for a day disqualified him from further sitting on that trial.

Held, further, that Judge Waite having left the court there remained but two qualified members, the presiding judge and Justice Lyle. They did not constitute a legal court. *The People v. Shaw*, 280.

5. The accused was indicted in the Oyer and Terminer held in the county of Ontario, for grand larceny, and by that court the indictment was sent for trial to the Sessions of that county. After the charge to the jury, they retired to consider their verdict and the justices of the Sessions who sat as part of the court during the trial, left the court room. While they were absent, the jury came in and stated that they had agreed upon their verdict. The county judge then, in the absence of the other members of the court, received the verdict of the jury. The jury was polled at the request of the counsel for the accused, and each answering guilty, their verdict was entered by the clerk. The counsel for the accused made a motion in arrest of judgment, upon the ground that the verdict was improperly received and entered. The motion was denied and the accused was sentenced by the county judge, to imprisonment in the Monroe county penitentiary for one year.

Held, that the rule is too well settled to be departed from or modified, that a verdict must be delivered in open court. To permit verdicts to be received otherwise than in open court, would lead to the greatest abuses. When the verdict was received, in this case, the court was held by the county judge only, and he cannot, under the law, hold a Court of Sessions. The conviction was, therefore, illegal and must be reversed. *Hinman v. The People*, 536.

CRIMINAL RECOGNIZANCE.

1. This was an appeal from an order of the General Term of the Supreme Court, affirming an order of Special Term, which denied a motion of defendant, to vacate a judgment entered on a forfeited criminal recognizance. The judgment was perfected under chapter 315, of the Laws of 1844. The record consisted of the recognizance and certified copy of the order forfeiting the same.

The defendant urges as a ground for vacating the judgment, that the summary method of perfecting such a judgment upon forfeited recognizances, authorized by the laws of 1844 and 1861, is in direct contravention of the fundamental doctrine embodied in the State Constitution, that "no person shall be deprived of life, liberty or property, without due process of law."

Held, that the defendant is not in a situation to take this objection. By the recognizance the defendant acknowledged an indebtedness, subject to a defeasance, and consented that upon failure to perform the condition, the debt should

become absolute, and judgment perfected thereon, and that execution might issue as upon other judgments for the recovery of a sum certain. The cognizors waived their right to any day in court other than that given them by the terms of the recognizance, and that day was had accordingly.

The defendant further says that the judgment was taken in disregard of the constitutional provision, preserving inviolate the trial by jury in all cases in which it has been heretofore used.

Held, that the right to a trial by jury, was waived by the terms of the recognizance and assent of the cognizors, and in all civil proceedings the right of a trial by jury may be waived. But the proceedings for judgments were not suits at common law, but a special statutory proceeding, summary in its character and unknown to the common law, and therefore not within the provision of the Constitution invoked by the defendants.

Held, that, repeal of statutes by implication is not favored and only takes place when two acts are so inconsistent that both cannot stand, and then the later act prevails. Laws, special and local in their application, are not deemed repealed by general legislation, except upon the clearest manifestation of an intent by the legislature to effect such repeal, and ordinarily an express repeal by some intelligible reference to the special act is necessary to accomplish that end. *The People v. Quigg*, 182.

DECLARATIONS.

1. *Held*, that the voluntary declarations and admissions of one on trial for a criminal offence, are always evidence against the party making them, and are more or less cogent as evidence of guilt, depending upon the circumstances under which they are made. The same principle gives effect to the action of the accused as evidence tending to prove or disprove his guilt. (Following, *Teachout v. The People*, 1 Cowen's Crim. Rep., 247; *The People v. Wentz*, same vol., 51; *Commonwealth v. Cuffee*, 108 Mass., 285; *Same v. Crocker*, id., 464.)

Held, that, where an individual is charged with an offence, or declarations are made, in his presence or hearing, touching or affecting his guilt or innocence of an alleged crime, and he remains silent, except in cases the individual sought to be affected could not with propriety speak, as in a judicial investigation, or a discussion between third persons, so that for him to speak would be a manifest intrusion into a discourse to which he was not a party, the evidence is competent and should be admitted.

Held, that it is no objection to the admission of the declarations of the accused, as evidence, that they are made while he is under arrest, and his admission, either express or implied, of the truth of a statement made by others under the same circumstances is equally admissible. His conduct and acts, as well when in custody as when at large, may be given in evidence against him, and their cogency as evidence will be determined by the jury. *Kelly v. The People*, 30.

DISORDERLY PERSON.

1. The defendant was convicted before a justice of the peace, of being a disorderly person for neglecting to support his wife and children, under the Revised Statutes. The defendant gave recognizance with sufficient sureties, and

the people claim that there was a breach of the condition of such recognizance. The statute declares that "the committing of any of the acts which constituted the person so bound, a disorderly person, shall be deemed a breach of the condition of such recognizance." The evidence in the case is, that the wife left her husband voluntarily in December, 1872, for the purpose of recruiting her health; that her husband was opposed to her leaving, and told her if she did go, not to return. These parties had been married several years, and had two children, one twelve years old, and the other an infant about a month old. They had resided most of the time in the house with the parents of the husband upon a large farm, but at the time of her leaving they were living in a 'hotel, a few rods distant, kept by the husband, but which was soon after rented, and the husband returned to reside with his father and mother. At the time of the execution of the recognizance they were living separate and apart. On the day the recognizance was executed, the husband offered to take the wife and children to his father's home and support them there as they had been before supported, occupying a separate portion of the house. The recognizance was given March 6, 1873, and on the 25th of March the wife wrote to defendant as follows: "I want you to come immediately, or send some one with means to pay for my support, and the support of your little children from March sixth up to the present time, or I shall prosecute the bail bonds." The husband answered on the twenty-ninth: "I am, and at all times have been ready and willing to support you at home, but not while you are absent therefrom against my wishes and consent." The wife declined to go with her husband, or to allow him to take the children, and she gave as a reason that she would not live in the house with his parents. She testified, "I declined to go to the house with his father and mother. I would not live in the family with them." She also testified, "I stated further in this conversation that it was not a suitable place because his father was intemperate, and very abusive; he abused every one in the house. I told him it was not a proper place to take me and the children. I don't remember that I did state anything why it was not proper."

Held, that this evidence was not sufficient to establish a breach of the recognizance. There was no pretence that the apartments were not comfortable, and the offered support proper and suitable. Nor was it claimed that the wife had been cruelly treated, or that her health or life was in danger from personal violence.

Held, that the husband has a right to select his own residence, and the support which this statute was intended to secure is, the necessities of life, or such as the parties have been accustomed to, and the husband is able to provide.

Held, that this summary statute was designed to enforce actual physical support only, not to interfere with marital relations, and when such support is tendered, the husband cannot be convicted in this *quasi* criminal proceeding for refusing or neglecting to furnish it. *The People v. Pettit*, 489.

DISORDERLY HOUSE.

1. The prisoners were convicted before the Court of Special Sessions of the Peace in the city of New York, of keeping a disorderly house.

The question came up on a writ of certiorari.

The return to the writ stated that the relators were brought before a commit-

ting magistrate, and that they thereupon elected to be tried by the Court of Special Sessions.

Held, that such election waived all objections to the jurisdiction of the court.

At the close of the trial, and after the prisoners had been convicted and sentenced, their counsel desired the court to note an appeal to the Court of General Sessions, for a rehearing of the case.

Held, that such a question does not properly arise upon *certiorari*. Such writ brings up only the proceedings to and including, but not subsequent to judgment, so that the only question to be determined is, whether any error has been shown, such as would justify a reversal of the judgment.

The counsel for the prisoners objected to the complaint on the ground that it did not specifically charge the prisoners with being the keepers of the disorderly house on the 24th day of May, 1874.

Held, that the rule is well settled, that the indictment will be good if the day and year can be collected from the whole statement, though they be not expressly averred. In this case the day and year is clearly gathered from the entire complaint and verification.

The defendant Gill was sworn in his own behalf. *Held*, that it was perfectly proper, and it was the duty of the court to interrogate him fully, to test the truth of his direct testimony. *Gill v. The People*, 93.

DYING DECLARATIONS.

1. The court also erred in receiving proof of the declarations of the deceased made after she had abandoned all hopes of life. Such evidence is admissible, in cases of homicide, only where the death of the deceased is the subject of the charge, and the circumstances of the death are the subject of the dying declarations. This is the settled rule, and it is unnecessary to discuss the reasons upon which it is founded. Applying the rule to this case, the declarations were not admissible. The charge against the prisoner was not homicide in any degree. The crime charged against him is that of persuading the deceased to submit to the use of an instrument upon her person, and to take drugs with the intent to produce her miscarriage — in consequence of which the death of the child, and her own were produced. *The People v. Davis*, 39.

2. On the trial it was shown by the people, under objection, that the deceased stated during her illness, and after she had abandoned hope of recovery, "that Charles and the Briggs woman was the cause of all this suffering, the cause of all this. That Charles and the Briggs woman knew all about this — something to that effect." "I talked with Mrs. Shaw only once about the cause of her sickness; she said she expected it was Charles and Mrs. Briggs."

Held, that these declarations were erroneously received, for the reason that they were not narratives of facts, but were conclusions or conjectures of the deceased as to the cause of her illness. Neither of these statements would have been competent evidence if the deceased had been alive and examined as a witness under oath; and they were therefore equally inadmissible as dying declarations. *Shaw v. The People*, 200.

3. The accused was indicted, tried and convicted, in the Oyer and Terminer of the county of Cayuga, of the crime of murder in the first degree. The General

Term of the Supreme Court, in the fourth judicial department, affirmed the judgment, and the accused brought error.

On the trial of the accused, the *ante mortem* declarations of the deceased, were admitted in evidence, under objections. Those objections were, that the dying declarations of the deceased should not have been admitted, because it did not appear they were made under an impression of immediate dissolution, and, because they were expressions of opinion, not statements of what the deceased knew to be facts.

Held, that these objections are not tenable. The facts, as they appeared on the trial were, that on Thursday evening, August 9, 1877, the deceased, Charles Moore, a farmer living in Cayuga county, who was a son-in-law of the accused, was shot as he was returning from his pasture, and died on the Sunday following. From the time he was shot the deceased was apprehensive that the wound was fatal. On Friday the deceased repeatedly stated that he would not recover, and on Saturday morning he was told by his physician that he must die, and there is not a doubt from the evidence but that he believed so himself. The only declarations allowed in evidence were the ones made by the deceased on Saturday, a short time before his death.

As to the second ground of objection, it appeared that the prisoner approached the deceased, disguised as a tramp, and that deceased stated, that at first he did not recognize him, but when he drew the pistol "and commenced his pranks," he knew that it was the prisoner. This was the relation of a fact, and that he spoke from knowledge derived from personal observation. *Brotherton v. The People*, 520.

EMBEZZLEMENT.

1. The accused was indicted for embezzling, at different times, money belonging to the money-order office in the city of New York, he being a clerk therein at the times when the alleged crimes were committed. The indictment was based upon the eleventh section of the "Act to establish a postal money-order system," passed May 17, 1864.

The indictment was found on the 21st of February, 1874, and the accused pleaded, "that the several offences did not arise, exist, or accrue, within two years next before the finding of said indictment." To this plea the United States demurred. Upon the sufficiency of this plea the judges were divided in opinion, and such division of opinion between the judges of the Circuit Court of the United States for the Southern District of New York, was certified.

The "Act for the punishment of certain crimes against the United States," passed 30th of April, 1790, declares, "Nor shall any person be prosecuted, tried or punished for any offence not capital, nor for any fine or forfeiture under any penal statute, unless the indictment or information for the same shall be found or instituted within two years from the time of committing the offence or incurring the fine or forfeiture aforesaid." The act of the 26th of March, 1804, in addition enacts, "that any person guilty of crimes arising under the revenue laws of the United States, or incurring any fine or forfeiture by breaches of said laws, may be prosecuted, tried and punished, provided the indictment or information be found at any time within five years after committing the offence or incurring the fine or forfeiture, any law or provision to the contrary notwithstanding."

Held, that the substantial question presented is, which of these two provisions applies to a bar to a prosecution for the offences described in the indictment in connection with the further question, whether the "Act to establish a postal money-order system" is a revenue law within the meaning of the third section of the act of 1804.

Held, further, that the offences charged in the indictment, were crimes arising under the money-order act, and, that neither the title or the sections of that act indicate that Congress, in enacting it, had any purpose of revenue in view. Its object, as expressly declared at the outset of the first section, was "to promote public convenience, and to insure greater security in the transmission of money through the United States mails," and, therefore, defendant cannot be prosecuted, tried, or punished, unless the indictment shall have been found within two years from the time of the committing the offences; and that the indictment is not for crimes arising under the revenue laws, within the intent and meaning of the third section of the act approved March 26, 1804. *United States v. Norton*, 358.

EVIDENCE.

1 The defendant was indicted for the murder of his wife, and the jury found him guilty. The evidence showed that the deceased came to her death from the effects of arsenic taken into her stomach; and there was strong reason to believe that she swallowed a portion of this poison during her absence from the house in Duane street, between Saturday evening and Sunday morning. If, during that absence, she was in the company of the prisoner, the latter had an opportunity to administer it to her in food or drink.

On the trial it was shown, under objection, that the accused on the Saturday evening before her death left the house of Mary Campbell, the witness, "with clothing for her husband, who was a watchman on some ship in the North River, as she said; she did not return until five o'clock the next morning; when she came in she appeared very ill; she said she got sick on board the vessel on which her husband was; she said she had not been drinking; she said that her whole frame seemed as if it were on fire, and her heart felt awful."

The court charged the jury that they might infer that the deceased was with her husband on the Saturday night preceding her death, although the evidence on that point was very slight. Exception was taken to this by the counsel for the prisoner.

Held, error. The intention of the deceased in going from the house of the witness with clothing was not material; it was not part of the *res gesta*, nor was the declaration of the deceased that she was ill, competent as a dying declaration; for although the deceased returned very ill, there is no evidence nor any reason to believe, that she apprehended a fatal result.

It was spoken at a time previous to any part of the transaction constituting the supposed offence, and in the absence of the prisoner, and when the deceased had no apprehension of danger, and much less was she *in extremis*. *The People v. Williams*, 13.

2. *Held*, that the recognizance was given in evidence without any proof of its execution, except what appeared upon the face of the instrument, and the testimony of an agent of the governors of the alms house that the prisoner had made

payments upon it. This was not sufficient. A recognizance is said to be a matter of record. 1 Chit. Crim. L., 90; *People v. Kane*, 4 Den., 530. But this was taken before a police justice in the city of New York, under the statute in relation to disorderly persons, and is but an acknowledgment, upon which, perhaps, a record might be made up. It does not appear to have been filed with any officer, and there was no proof of its execution, nor of the identity of the persons recognized, except by the payments. *Id.*

8. The defendant was indicted in the county of Monroe for the crime of receiving stolen goods, knowing them to be stolen.

Held, that the rule is well established, that in cases like the present, where guilty knowledge is an ingredient of the offence charged, the same may be proved as other facts are proved, by circumstantial evidence, and that other acts of a like character, although involving substantive crimes, may be given in evidence to prove the *scienter*. The principal limitation of this rule is, that the criminal act which is sought to be given in evidence, must be necessarily connected with that which is the subject of the prosecution, either from some connection of time and place, or as furnishing a clue to the motive on the part of the accused.

Held, that the declarations of a party to a civil or criminal procedure, in respect to matters within his own knowledge, or of which he may be presumed to have knowledge, and relevant to the issue, are always competent against him.

Held, that the true rule and the only rule that can be sustained upon principle is, that the intendment of law is, that an error in the admission of evidence is prejudicial to the party objecting, and will be ground for the reversal of the judgment unless the intendment is clearly repelled by the record. The error must be shown conclusively to be innoxious. It is not enough that the appellate court may be of the opinion that the result ought to, and probably would have been the same if the objectionable evidence had been excluded, and especially ought not such a presumption avail to cure an error upon a criminal trial. *Coleman v. The People*, 18.

4. The defendant was indicted for having in possession, with intent to utter, an altered bill. On the trial the district attorney proved the finding of the altered bill upon the defendant; his confession that the bill "was one he had fixed that day," and that "he did not think he had passed over three in a week, perhaps not more than one," and that "it was a great trouble for so little money." The district attorney further proved, under objection, that the officer "searched the defendant's wife and found in her possession the handkerchief produced, having a large number of the ends of figures in the margin cut from bank bills now shown."

Held, that the evidence showing the wife had in her possession engraved figures, cut from genuine bills, was incompetent, as there was no evidence of any concert between the prisoner and his wife, or that either of them had any knowledge of the facts which were proved against the other. Where two persons sustaining the relation of husband and wife are each found doing acts indicating criminal designs of the same nature, there are strong reasons for conjecturing that they are conspiring together; but it is mere conjecture, and not evidence, even presumptive of the fact. *The People v. Thoms*, 23.

5. The defendant was tried and convicted of grand larceny, in stealing a quantity of pig-iron.

Exception was taken to the refusal of the court to take the case from the jury, on the ground that the description of the identity of the property, was too indefinite, vague and uncertain, to convict the defendant upon, and not sufficient in law to be submitted to the jury.

Held, that the testimony of the agent being, that it bore the marks, and presented the appearance of the iron in his possession, some of which had been taken away, and that he did identify the iron, when he saw it the following day after the defendant was arrested, and the uncontradicted testimony that the defendant said he bought the iron of a canal boat captain for fifteen dollars, when its value was shown to be fifty-two dollars, to be sufficient to justify the submission of the question of the identity of the property to the jury.

The defendant's counsel requested the court to charge the jury, that the mere possession of the property stolen, was not *prima facie* evidence of the commission of the larceny by the defendant. The court so refused to do, and an exception was taken.

Held, that the possession was so recent and so suspicious, that it was consistent with no other rational conclusion, than that of guilt. "Generally, whenever the property of one man, which has been taken from him without his knowledge or consent, is found upon another, it is incumbent upon that other to prove how he came by it; otherwise the presumption is that he obtained it feloniously." (2 East's Crim. Law, 656.) Its accuracy as a general legal proposition, is sustained by the decision made in the case of *Knickerbacker v. The People*, 1 Cowen's Crim. Rep., 287.

The court declined to charge the proposition, that where a man, in whose possession stolen property is found, gives a reasonable account of how he came by it, the prosecutor was required to show the account to be false.

Held, that while the proposition might be true, as to a large class of cases, the prosecutor cannot be required to show that the defendant's statements are false, as long as the circumstances attending it, are such as to indicate that they are not true. What the law requires, is, that the defendant's statement should be credited where it appears to be probable, and consistent with the facts. The question is one for the jury. *Dillon v. The People*, 25.

6. The prisoners were jointly indicted and convicted of grand larceny.

Held, that the voluntary declarations and admissions of one on trial for a criminal offence, are always evidence against the party making them, and are more or less cogent as evidence of guilt, depending upon the circumstances under which they are made. The same principle gives effect to the action of the accused as evidence tending to prove or disprove his guilt. (Following, *Teachout v. The People*, 1 Cowen's Crim. Rep., 247; *The People v. Wentz*, same vol., 51; *Commonwealth v. Cuffee*, 108 Mass., 285; *Same v. Crocker*, id., 464.)

Held, that, where an individual is charged with an offence, or declarations are made, in his presence or hearing, touching or affecting his guilt or innocence of an alleged crime, and he remains silent, except in cases the individual sought to be affected could not with propriety speak, as in a judicial investigation, or a discussion between third persons, so that for him to speak would be a manifest intrusion into a discourse to which he was not a party, the evidence is competent and should be admitted.

Held, that it is no objection to the admission of the declarations of the accused, as evidence, that they are made while he is under arrest, and his admission,

either express or implied, of the truth of a statement made by others under the same circumstances is equally admissible. His conduct and acts, as well when in custody as when at large, may be given in evidence against him, and their cogency as evidence will be determined by the jury.

Held, that a conspiracy may be proved, as other facts are proved, by circumstantial evidence, and parties performing disconnected overt acts, all contributing to the same result and the consummation of the same offence, may, by the circumstances and their general connection or otherwise, be satisfactorily shown to be conspirators and confederates in the commission of the offence. If there was evidence to justify the conclusion that the parties were all acting with a common purpose and a common design, and although there may have been no previous combination or confederacy to commit this particular offence, the conduct and actions of the several parties, and the parts they severally performed in the actual perpetration of the crime, was sufficient to make the acts and declarations of each, from the commencement to the consummation of the offence, evidence against the others. The declarations were not given in evidence to prove the guilt of the parties on trial, and as the declarations of one conspirator against another, but as a part of the *res geste*, a part of the history of the transaction, and as such it was competent.

Held, that the admission of the question "What did Reynolds say?" and the answer "There goes the other one," or "one of the parties," "the lawyer," pointing to Mulhall, under the objection it was "not rebutting evidence," was not error, as it was discretionary with the court to permit the prosecution to give evidence not strictly responsive, and an exception does not lie to the exercise of such discretion.

Held, that the juror, Perry, having sold his real estate before the time of the trial, and not being assessed for personal property, was not a qualified juryman, and the holding that the property qualification, when questioned by a challenge, must be that required to authorize the original selection of the individual as a juror, was not error. *Kelly v. The People*, 30.

7. On the trial, Mrs. Phebe Pensy testified on the part of the people, that the defendant and his wife came to her house, and that Clara Pensy went away with defendant in a buggy, and they returned about one o'clock in the night; that the witness did not see the defendant on his return nor speak to him, nor did he come into the house when he came back.

The district attorney then offered to show that Clara stated to the witness, upon her return, what had been done to her while she had been away, which offer was allowed by the court, under objection. The witness then testified to what had been done and said by Dr. Crandall.

The district attorney offered to prove the dying declarations of Clara Pensy, which were admitted under the objections of the counsel for the defendant.

Held, that the admission of evidence of the statement of the deceased, in the absence of the accused, as to what was done and said by Dr. Crandall at his office, was error. Anything said accompanying the performance of the act, explanatory thereof or showing its purpose or intention, when material, is competent as part of the act. But when the declarations offered are merely narratives of past occurrences, they are incompetent, and not part of the *res geste*.

Held, also, that this ruling could not be sustained upon the ground that the deceased was a co-conspirator. To make the declaration competent it must

have been made in the furtherance of the prosecution of the common object, or constitute a part of the *res gestæ* of some act done for that purpose. A mere relation of something already done for the accomplishment of the object of the conspirators is not competent evidence against the others. The means to produce the miscarriage, upon the theory of the prosecution, had already been applied. There remained nothing further to be done to effect this object. The conspiracy was therefore ended.

Held, that the court erred in receiving proof of the dying declarations of the deceased. Such evidence is admissible, in case of homicide, only where the death of the deceased is the subject of the charge, and the circumstances of the death are the subject of the dying declarations. This is the settled rule. The crime charged in this case was not homicide in any degree. *The People v. Davis*, 39.

8. The prisoner was tried for forging the indorsement of one Talmy Van Amburgh, upon a promissory note. The defence was, that the prisoner was authorized by Van Amburgh to sign his name, and that he made the signature in question in pursuance of that authority. There was a conflict of evidence on this point, and to establish the guilty intent, the prosecution put in evidence a letter of the prisoner to his father-in-law, John R. Ganoung, admitting that he had made a similar use of his name without authority upon other notes. The judge charged the jury, in substance, that the admissions of the prisoner in the letters, of the use of Ganoung's name, they could consider in determining the intent of the prisoner at the time he indorsed Van Amburgh's name. To this an exception was taken by the prisoner.

Held, that the fact that the prisoner made an unauthorized use of Ganoung's name does not tend to show that he criminally indorsed Van Amburgh's name, or that he knew and understood that Van Amburgh's authority had been withdrawn, or that the signature in question was made with a criminal intent. Following. *Coleman v. The People*, 55 N. Y., 81; *S. C.*, 1 Cowen's Crim. Rep., 573. *The People v. Corbin*, 45.

9. The indictment charges larceny, after a former conviction for the same crime. Proof of the former conviction was objected to on the trial, and is claimed to be incompetent upon the ground that it tended to establish bad character by proof of specific acts; which is improper, especially, before the prisoner puts his character in issue.

The former conviction and discharge must be alleged in the indictment, and, upon issue joined, must be proved on the trial and passed upon by the jury. There is no other mode of proving the facts, and this has been the uniform practice in this State. A more severe penalty is denounced by the statute for a second offence; and all the facts to bring the case within the statute must be established on the trial. (2 Car. R., 37.) The objection that the evidence may affect the prisoner's character has no force when such evidence relates to the issue to be tried. Such evidence may be prejudicial to a prisoner as to the second offence, and a case might occur of a conviction upon too slight evidence, through the influence which a previous conviction of a similar offence might exert upon the minds of the jury; but there is no legal presumption that such a result will ever be produced. An English statute, passed in 1837, requires the principal charge to be first found by the jury, and then authorizes proof of the former conviction to be presented to them; but we have no such statute.

It is also objected that there was no evidence that the prisoner had been discharged or pardoned, as the statute requires, except by the fact that sufficient time had elapsed to enable the prisoner to serve out his sentence. This we held to be insufficient in the recent case of *Wood v. The People*, 1 Cowen's Crim. Rep., 554; but the point is not available because it was not taken on the trial. The attention of the court should have been called to the question, and, if decided adversely, an exception taken. If this had been done the prosecution might have supplied the proof. *Johnson v. The People*, 48.

10. The prisoner was indicted and convicted of forgery, in passing a counterfeit bill on the Westfield Bank.

Held, that the conviction was error. The admission of evidence to show that the prisoner had passed two bills some two or three days after the transaction for which he was on trial, without showing they were of the same bank, as the one in question, nor even that they were counterfeit, had no legal bearing upon the issue which was on trial. *The People v. Dibble*, 54.

11. The defendant was convicted of rape. The prisoner with two companions visited the complainant at her rooms, and while there, and at that time, Mrs. Milley the prosecutrix testified, that he committed the crime of rape upon her. Upon the trial the prisoner offered to prove by seven witnesses that the complainant was in the habit of receiving men there for the purpose of promiscuous intercourse, and for liquor especially. This evidence was objected to by the prosecution and rejected by the court.

Held, that the question was whether the accused ravished the prosecutrix by force, or whether she assented to such intercourse. Upon this issue all the authorities concur in holding that evidence showing that the character of the prosecutrix for chastity was bad, is competent, and this for the reason that it is more probable that an unchaste woman assented to such intercourse than one of strict virtue. The evidence is received upon this ground, and not for the purpose of impeaching the general credibility of the witness. Evidence showing that the prosecutrix has on a previous occasion had connection with the accused is competent, and this for the reason that having done this shows a probability that she did not resist but consented to the act charged in the indictment. *Woods v. The People*, 55.

12. Conkey and Harrington were indicted for rape. The indictment stated that it was found by *twenty-four* grand jurors. It charged in first count rape against both; in second Conkey with rape, and Harrington with abetting him; in third both with assault with intent to commit rape. The district attorney was allowed to prove under objection that immediately after the offence was committed, Conkey overturned the stove, broke windows and threw articles out of the room.

The court allowed the prosecution to prove by the prosecutrix that on the day of the rape that she told one Edwards of the crime, and she added "I did not tell him all that was done. I told him they had abused me." On cross-examination she swore, "I did not tell Conkey had had connection with me. I told him the rest they had done." The prosecutrix's husband was allowed to testify: "I first told Mr. Edwards of what had happened Sunday morning. I did not tell him about Conkey getting on the bed, but my wife did. She said they abused her so she could not help about putting up the stove." Medbury, for defendant, testified: "I think I know how she is regarded in New Berlin

by some of the people." He was then asked: "From the speech of people, is her character good or bad?" The question was excluded. He further swore, "I don't know how she is generally regarded in the community." Cady was called for prosecution who swore, "I think I have heard enough to form an opinion of her character. In my own mind her character is good. I know the impression of the community is, her character is good." Nehemiah Hill first swore that he did not know that he had the means of knowing about her character for chastity but added, "I think I am prepared to judge," and swore that he considered her character good. The verdict of the jury was, "That they find the prisoners at the bar guilty of the offence charged in the indictment."

Held, that the evidence of the conduct of the prisoner, Conkey, immediately after the perpetration of the offence, was properly admitted. It characterized the whole transaction, showing that the carnal knowledge which was had was effected under violence and threats, calculated to terrify and alarm the prosecutrix; the whole was one continuous act.

Held, that the disclosure made by the prosecutrix upon the first opportunity after the commission of the crime of rape, and the apparent state of mind of the party suffering from the injury, are always regarded as very material, and the forbearance to mention for a considerable length of time the circumstances of the occurrence is a reason for imputing fabrication to the accusation.

Held, that the admission of the testimony of the husband of the prosecutrix, that his wife had complained the next morning to one Edwards, in his presence, of the manner in which the defendant had abused her was not error.

Held, that on the trial of a person charged with rape, the character of the prosecutrix for chastity may be impeached by general evidence as to what is generally said of the person by those among whom the witness dwells, or with whom he is chiefly conversant, for it is this only that constitutes general reputation or character. *Conkey v. The People*, 58.

13. The ground upon which a reversal is claimed, is that the court below erred in specially interrogating the prisoner.

Held, that as Gill chose to take the stand as a witness upon his own behalf, it then became perfectly proper, and indeed the duty of the court, to interrogate him as fully as might be needful to test the truth of his direct testimony. *Gill v. The People*, 93.

14. The plaintiff in error was indicted, under the act making seduction a crime (Chap. 111, Laws of 1848), for seduction under promise of marriage. The promise, as sworn to by the prosecutrix, was a conditional one that the accused would marry her if she would consent to an illicit connection with him; and that, relying on the promise, she consented.

Held, that this was sufficient to bring the case within the statute. *Boyce v. The People*, 63.

15. The prosecutrix also testified that the accused, to induce her to consent to his proposal, stated in substance, that he never would marry a girl unless he was satisfied she was a virgin, which he would ascertain only by her assenting to his proposition. But upon her expressing apprehension that he would leave her if she yielded to him, he assured her, in the strongest terms, that he would marry her. The prisoner's counsel asked the court to charge in substance, that if the promise to marry was not an existing one, but an inchoate proposition

depending upon the result of illicit intercourse as furnishing evidence of virtue to complete the mutuality of the contract, the case was not within the statute. The court declined so to charge.

Held (Church, Ch. J., and Rapallo, J., dissenting), no error, as there was no just foundation in the evidence to claim that the promise was to marry only in case the accused should be satisfied that the prosecutrix was a virgin; that it was to the promise and not to any test of virginity that she gave her consent. *Id.*

16. The time of the alleged seduction was February 5, 1871, followed by subsequent intercourse down to August, of the same year. It was proved, without objection, that the prosecutrix was delivered of a child February 10, 1872. The prosecution disclaimed any reliance upon this fact as corroborating the evidence of the prosecutrix; the court held the evidence immaterial.

The prisoner's counsel offered evidence that between the 5th of February and the 1st of May, 1871, the prosecutrix had carnal connection with another man, which was excluded.

Held (Church, Ch. J., and Rapallo, J., dissenting), no error; that pregnancy was not essential to the consummation of the offence charged; that the evidence rejected could only have been material to obviate the effect of that fact as corroborative evidence, and, as that was expressly disavowed, the rejection was proper.

17. Also, that the rejection could be sustained upon the ground that the offer was not limited to show any illicit intercourse at a time when the child could have been begotten, and was in effect simply to show that after the alleged seduction she had been guilty of fornication with another person, which was clearly incompetent. The prisoner's counsel then asked to have the evidence, as to the birth of the child, stricken out, which was denied.

Held, no error; that as it was received without objection, and the right to use it in support of the charge was disclaimed, there was no strict right to have it formally stricken out. *Id.*

18. The prisoner's counsel also claimed that the prosecutrix was not supported by other evidence, as required by the statute. Other evidence was given that she was alone with the prisoner at the time she charged the offence was committed, also as to her condition and appearance after it, as to his attentions and familiarities, and as to his solicitude during her sickness immediately following the alleged offence.

Held, that the statute did not require direct or positive corroborative evidence as to any of the material facts, but rather such evidence as has been ordinarily required in corroboration of the evidence of an accomplice when called as a witness against his confederates in crime, or circumstances usually relied upon as tending to prove the material facts, and which from the nature of the case are susceptible of being proved, to satisfy the jury that the principal witness is worthy of credit; that, from the peculiar character of the offence, circumstantial evidence only can, save in rare instances, be adduced, other than from the parties concerned, and to require more would be to render the statute mere *brutum fulmen*; and that the corroborative evidence was sufficient to meet the requirements of the statute. *Id.*

19. The prisoner was indicted, tried and convicted, for the crime of rape.

On the trial, the court was asked to charge "If the jury believe the prosecuting witness did not make prompt disclosure of the alleged wrong it is a circumstance against her, casting a great discredit on her testimony and tends strongly to disprove the truth of the accusation." The court so refused to charge and an exception was taken.

Held, that the proposition, although quite general and somewhat vague, is substantially correct. The request had no pertinency to the facts of the case, as there were no grounds for saying that the disclosure was not sufficiently prompt. The rule does not require it to be made to the first person who happens to be seen. The rule is founded upon the laws of human nature, which induce a female outraged to complain at the first opportunity, and any considerable delay on the part of a prosecutrix to make complaint of the outrage constituting the crime of rape, is a circumstance of more or less weight, depending upon the other surrounding circumstances. A want of suitable opportunity, or fear, may sometimes excuse or justify delay. *Higgins v. The People*, 65.

20. The prisoner was jointly indicted with two others, for obtaining money by false pretences, from one Catharine Wulff. He was convicted and sentenced.

The indictment alleged several representations and averred that each was false and fraudulent. Direct evidence was given of the falsity of but one.

The court charged, in substance, that it was sufficient to show the falsity of any one of the alleged pretences which induced the complainant to part with her money.

Held, that this was correct. It was sufficient to show that one of the material representations alleged was false and fraudulently made, provided it was proved to the satisfaction of the jury that such representation was a substantial inducement to the parting with the money.

On the trial it was shown, under objection, that the prisoner with one of his co-indictees, practiced the same fraud on another person a day or two prior to the commission of the offence charged in the indictment, in which the prisoner acted the same part played by another of the parties on the occasion of obtaining the money from the complainant.

Held, that the evidence offered and received of previous like transactions of the accused, was given and received to show the *quo animo*, or intent, of the accused in the particular offence charged, and also as tending to show the known falsity of the pretexts upon which the money of Mrs. Wulff was obtained. For these purposes, it was competent. *Bielschowsky v. The People*, 96.

21. The prisoner was indicted, tried and convicted at a Court of Sessions of Columbia County, of an assault with a deadly weapon with intent to kill.

The accused worked for Son, the complainant, and lived in a dwelling house belonging to him. The agreement between the accused and complainant was that Kerrains was to work for Son for a year, if they could agree; Son to pay thirteen shillings per day, and to furnish Kerrains with a house, the prisoner to work at whatever the former had for him to do. Kerrains worked for Son until the latter part of June, 1871, when Son asked him to "haul the bleach," which he refused to do. Son then discharged him, paid him up, and told him to leave the premises or he would throw his things out. The prisoner refused, and did not leave. Son with two men went to the house occupied by Kerrains, in his absence, and commenced removing Kerrains' furni-

ture. Kerrains was sent for by his wife—he returned, saw what Son was doing, picked up an axe, went into the house and ordered Son and his men out. Son refused to go, presented a pistol, when an altercation occurred and Kerrains struck Son with the axe, inflicting an injury.

On the trial Kerrains was sworn in his own behalf and was asked the following question: “What was your intention in taking the axe from the shed to the house?” The question was objected to and the objection sustained.

The court charged the jury that the prisoner occupied the house as a servant, and not as a tenant; and, therefore, the prosecutor had the legal possession.

Held, that if the relation of master and servant existed it would follow that the legal possession of the house was in the prosecutor, and he had the legal right to remove the furniture and goods therein, and to employ the necessary force for that purpose, and that the defendant would not be justified in using force to prevent it. The question depends upon the nature of the holding, whether it is exclusive and independent of, and in no way connected with the service, or whether it is so connected, or is necessary for its performance. From the facts in this case, the court decided correctly, that the defendant occupied as a servant, and not as a tenant.

Held, that the court, in sustaining the objection of the prosecution to the question, “What was your intention in taking the axe from the shed to the house?” committed an error. The intent to kill was indispensable to be established by the prosecution, it constituted the vital element of the offence, and although it is true that the time when that intent must exist was when the blow was struck, yet it was competent for the defendant to testify to any fact tending to disprove such intent. It is a fact to be established, and, of course, may be repelled. The rule is, following *McKown v. Hunter*, 30 N. Y., 625, that when the motive of a witness in performing a particular act, or making a particular declaration, becomes a material issue in a cause, or reflects important light upon such issue, he may himself be sworn in regard to it, notwithstanding the difficulty of furnishing contradictory evidence, and notwithstanding the diminished credit to which his testimony may be entitled as coming from the mouth of an interested witness. *Kerrains v. The People*, 102.

22. The prisoner was indicted and convicted of an assault, with intent to kill. The defence was insanity. Dr. Clymer, was sworn and examined as a witness, on the part of the defence. He testified that he was a physician and understood the indications and symptoms of the existence of the form of insanity by which it was claimed the prisoner was affected, and that the facts relied upon, indicated unsoundness of mind.

In submitting the case to the jury the court said, that he “placed no reliance whatever upon Dr. Clymer’s testimony, except what is due to the testimony of a sensible and honest gentleman; but I have equal respect for the opinion of you, gentlemen, who, as men of the world, having attained a mature age, and seen life in many of its phases, are quite as competent, perhaps, to pass upon this testimony as experts, as is Dr. Clymer.”

Held, that this language conveyed to the jury the opinion of the court that it was their duty to disregard the evidence of the witness as an expert and was, therefore, error. The evidence of medical experts is admitted on questions of insanity, on the ground that jurors are not deemed equally skilled and as able to decide whether insanity exists, as are such experts. The jury is to deter-

mine what weight is to be given to such testimony and they must be left at liberty to exercise their judgment on the subject, without being controlled by any positive direction by the court. *Templeton v. The People*, 108.

23. *Held*, that, if a person swears falsely in respect to any fact relevant to the issue being tried, then we think he is guilty of perjury, although the case failed from defect of proof of another fact, and although the other fact alleged had no existence. It is not necessary that the false statements should tend directly to prove the issue, in order to sustain an indictment for perjury. If the matter sworn to is circumstantially material or tends to support and give credit to the witness in respect to the main fact, it is perjury. *Wood v. The People*, 116.

24. The defendant was convicted before the Court of General Sessions, of the city and county of New York, of an assault with intent to kill, or to do bodily harm. The defence was justification.

On the trial the court asked the question: "Evers, can you explain to me this thing; while Curran, that was able to whip you, kept picking at you for amusement, why should he have put his hand in his pocket after giving you three terrific licks in the face? what was the occasion for drawing a pistol?" To which the prisoner's counsel duly excepted.

Held, that the question excepted to was objectionable. The Recorder seems to have been impressed with the conviction that the complainant being the conqueror, it was absurd in him to resort to a weapon; but that was for the jury to determine, not upon the reasons or opinions of the defendant, but upon the facts and circumstances disclosed. We cannot say that the question did not do the prisoner any injury, and, upon well settled principles of evidence, that is sufficient to demand a reversal of the judgment. *Evers v. The People*, 127.

25. The prisoner was indicted for burglary in the third degree, in breaking and entering a store in the night time, and stealing therefrom certain goods kept there for sale.

On the trial it was shown that the scuttle of the store had been forced open, and the lock of the back door had been burst open, through which the presumption was that the burglars had entered.

Held, that this evidence established the burglary.

Among the articles missed from the store in the morning, when the burglary and theft were discovered, was a quantity of cigars, not mentioned in the indictment, that had disappeared with the articles which were set forth, and proof, under objection, was allowed of the fact.

Held, that it was a part of the same act which constituted the crime charged, and admissible as a circumstance showing its nature and extent.

A box of burglar tools, found in the office of Adams Express Company, at Boston, shortly after the burglary, was produced and identified at the trial. It was shown that the box, containing the tools, had been made for the prisoner; had been taken to the prisoner's residence, and sent away from there in an express wagon. The box was marked Foster, and the prisoner was present at the express office when it was found there.

This evidence was objected to on the ground that the box was in no way proven to be connected with the prisoner.

Held, that, in view of the evidence given upon the subject, and the form of the objection, the reception of the evidence was not error.

After the box and contents were received in evidence, objection was made to a witness giving the names of the articles in the box, and a motion was made, after its reception, to strike out such evidence.

Held, that no error was committed in the receiving, or refusing to strike out the evidence objected to. By the form of the objection, it was conceded that the box and its contents were proper evidence, if the prisoner had been sufficiently shown to have been connected with them. After this concession, and the box and its contents were received in evidence, it was too late to allow the motion to strike out the evidence to prevail. *Foster v. The People*, 132.

26. The court charged the jury: "And here let me remind you that the complainant testified (and that you may consider an important piece of evidence), that when he was walking along and heard this stealthy step behind him, the street appeared to be deserted. You will recollect the time—it was on the fifth of August; you won't forget the place—it was the Fifth avenue; you have a right, of your own knowledge, to take notice of the circumstance that at that time, the fifth of August, no part of the city was probably more likely to be deserted, even as early in the night as nine o'clock, than that part of the avenue," to the last sentence of which the counsel for the prisoner excepted.

Held, that the exception was well taken. The condition of the street, as to whether deserted or not, at the time and place described, was a fact to be proved, like other circumstances in the case, and whether a certain street in a large city is likely to be deserted at nine o'clock in the evening, is clearly not within the rule of evidence which justifies a judicial notice of that fact. *Lenahan v. The People*, 134.

27. The prisoner was tried and convicted by the Court of Sessions of the county of Niagara, of the crime of rape. On the trial one of the justices of the Sessions left the bench, while the trial was in progress, and was sworn and examined as a witness on the part of the prisoner, and was subsequently recalled and examined for the prosecution, in both cases without objection. A motion in arrest of judgment was made, on the ground that the court had lost jurisdiction of the case by the justice of the Sessions leaving the bench to take the witness stand. The motion was denied.

Held, that the court did not lose jurisdiction of the case because one of its members left the bench to stand for a time, in the same room, in the witness box.

Held, also, that it was error to permit the justice of the Sessions, a member of the Court, to be sworn and testify as a witness. Not because in this instance any harm came either to the people or to the defendant; but because such practice, if sanctioned, might lead to unseemly and embarrassing results, to the hindering of justice, and to the scandal of the courts.

The court was asked to charge the jury, that they must be satisfied from the evidence, before finding the prisoner guilty, that the prosecutrix resisted him to the extent of her ability, on the occasion it is alleged the defendant committed the offence charged against him. The court declined to charge as requested.

Held, that the refusal was error. It was to the extent of her ability, and not only that, but to the extent of her ability *on that occasion*, to which the request

to charge asked that the attention of the jury be directed. It is the law of this State, that the woman must have resisted to the extent of her ability, on the occasion on which she alleges that this grievous wrong was done her. *The People v. Dohring*, 141.

28. The accused was indicted for the murder of his wife, by poisoning with corrosive sublimate, and Sarah Briggs was jointly indicted with him, as accessory before the fact.

The counsel for the accused offered to prove that the deceased said several days before her sickness, "that she had poison and knew how to use it; and that rather than Mrs. Briggs should have her children, she would put them all under the sod;" and also, "that rather than Mrs. Briggs should be step-mother to her children, she would put them under the sod." The court rejected the evidence and an exception was taken.

Held, error. The prosecution were permitted to give in evidence the threats of the accused against the life of the deceased, and it was equally proper for the accused to prove the threats of the deceased against her own life and the lives of her children. *Shaw v. The People*, 200.

29. The prisoner was tried and convicted, in the Oyer and Terminer, held in Rockland county, of the crime of murder in the first degree, in killing Matilda Hugus.

On the trial the witness Gamble, who was in the room when the shot was fired by the accused, which killed the deceased, testified on the part of the people that he was the defendant in three suits brought against him by the accused and his brother; that he had been several times to attend the trial of them, and that each time Mrs. Hugus, the deceased, had accompanied him; and that he knew what the suits were for. The district attorney then asked Gamble, "Tell the jury what they were for?" An objection was taken by the counsel for the prisoner, and overruled by the court. The witness then stated that the suits were brought to set aside deeds from his wife, the sister of the accused, to him. The wife of the witness was dead, and it was shown that the suits were set down for trial on the Monday after the murder.

Held, that it was clearly competent for the people to show that a litigation was pending between the prisoner and Gamble, and also the nature of the litigation, as bearing upon the existence of a motive on the part of the prisoner to commit the murder. It was left uncertain whether the design of the guilty party was to kill the deceased or Gamble. Both were in a position to be reached by the discharge of the gun or pistol, although it proved fatal only to Mrs. Hugus. The strength of the motive might depend upon the nature of the controversy and the extent of the pecuniary interests involved.

The objection is now taken that parol evidence cannot be given of the object of the suits, and that the pleadings were the best evidence of the issues in the actions.

Held, that as no objection of this kind was taken on the trial, it is not now available.

On the trial Pinkerton, a witness, was examined and in answer to the question as to what the measurements taken by him were, answered "I measured from the outside of the flower bed where the man stood," and then upon objection being made, said, "from where the footprints were up to the window, where

the shot went in, was five feet three and-a-half inches, inside two feet eleven inches. I had a man sit in a chair, and measured from the floor to the top of his head." Prisoner's counsel moved that the first part of the answer be stricken out, on the ground that there was no proof that the witness knew where the man stood, and that the last sentence of the answer be stricken out on the ground that the testimony was irrelevant. The motion was denied and an exception taken.

Held, that the denial of the motion was not error. The first part of the answer assumed that the man by whom the footprints were made, stood at that place, but on objection being made the witness changed the form of the answer. The measurement of two feet and eleven inches, was the distance from the floor to the window, and had no reference to the measurement in question.

A witness who was sworn on the part of the people, testified in relation to the conversation between the prisoner and Pinkerton, at the sheriff's office, under objection.

Held, that the general rule applicable as well in criminal as civil cases is, that the declaration of a party, in respect to the subject-matter under investigation, whenever made, are admissible against him. This is qualified by the exception to the rule that, whenever the declarations of a person charged with crime are not voluntary within the legal meaning of that term, they are not competent and cannot be admitted in evidence. In this case it appeared that the declarations of the prisoner narrated were reduced to writing at the expressed desire of the accused, therefore there is no ground for the suggestion that the statement was not voluntary.

It was shown by the people, that on the evening of the murder and after it was committed, a mask was found under the window where the shot was fired, and during the conversation with Pinkerton, before alluded to, the prisoner was asked by one Schute "where did that mask come from?" He answered, "the children got that from the ragamuffins," and immediately added, as if recollecting himself (so the witness stated), "that mask had a black nose, and was torn down the face." The counsel for the prisoner moved to strike out the testimony as to the mask, on the ground that the mask had not been connected with the prisoner. The motion was denied.

Held, that the decision on the motion was correct. The fact that a mask had been found had not been communicated to the prisoner when the conversation occurred. His reply to the question indicated that he had knowledge that a mask was in some way connected with the transaction. It was proper to be shown as tending to connect the prisoner with the mask found on the night of the murder. *Murphy v. The People*, 217.

30. The accused was tried upon an indictment for grand larceny, convicted, and sentenced to imprisonment for five years.

The prisoner was a jeweler in New York city, and sent, what was known as a memorandum order, to Charles Kuhn & Co., engaged in the same business, for six pairs of gold band bracelets, which were sent to him on that order, by said firm. The order was designed and understood to be an application for the articles mentioned in it, for the purpose of showing them to a customer to select from, who, if he accepted either, the price for that article, with the remainder of the articles, should be returned to the firm filling the order. Neither

the articles sent on the order, nor the money for either of them were returned by the accused.

Held, that the title to the property sent upon the order did not pass from the firm of Kuhn & Company to the accused under this arrangement. So long as no sale was made it was not the design of the parties that the title should pass. The prisoner was a mere custodian of the property for the persons sending it to him; and if he acquired that feloniously, for the purpose of depriving the owners of it by means of the artifice he made use of, that was sufficient to constitute the crime of larceny. The felonious acquisition was a question for the jury.

Held, that the distinction between this class of cases, and obtaining money by means of false pretences, consists in the circumstance that in the latter the owner intends to part with his title with the change of custody, while in the former no intention of that kind exists.

On the trial the prosecution was allowed to show, under objection, that the prisoner obtained these articles from the complainants, in the same manner they had procured other articles of jewelry from other parties, appropriating the same to his own use, for the purpose of establishing the felonious intent in obtaining those mentioned in the indictment.

Held, that the intent is the vital fact to be ascertained; and proof of other acts, plainly within one common purpose and design, are received to show the felonious intent. *Weyman v. The People*, 236.

31. The accused was tried and convicted by the Court of Oyer and Terminer in the county of Onondaga, of the crime of murder in the first degree.

The prisoner and one Bishop Vader were jointly indicted for the murder of Francis A. Colvin, charged to have been committed on the 19th of December, 1873. The prisoner was tried separately.

A body was found in the Seneca river, June 22d, 1874, which was identified as the body of Colvin. The skull was found fractured.

Dr. Kimball was called as a witness. He testified to his ability to tell whether the fracture was old or recent, and then he was asked whether the fracture of the bones of the skull of the deceased, as taken from the river, was old or recent. The objection to this was, that the opinion of the witness was not competent. This objection was overruled and an exception taken.

Held, that in this ruling the court committed no error. The objection was not to the competency of the witness, but to the fact sought to be proved. The fact when the injuries to the skull were made was material and could be proved only by the opinion of those who saw it, and were competent to form an opinion. It was the best evidence of which the fact was susceptible.

Vader, the confessed accomplice in the murder, was sworn on the part of the people. The counsel for the accused objected to his evidence being received on the ground that he was a principal, equally guilty with the accused, in the commission of the offence charged.

Held, that an accomplice is, in all cases, a competent witness for the prosecution, but whether he shall be permitted to become a witness, and thus earn an exemption from punishment, which is the implied condition of his turning informer, and declaring the whole truth, is in the discretion of the court and the prosecuting officer. Whether more or less guilty does not affect their com-

petency; the extent of their guilt, and the nature of their offence go to their credit with the jury.

The witness Moore was allowed to answer, under objection, as to the conduct of the accused about the time of the alleged murder.

Held, no error. The acts and declarations of a party are evidence against him, and whether they tend to fix a crime upon him is for the jury. The answer given was stricken out and the jury directed to disregard it, therefore the accused was not prejudiced by it, and beside the court declared it wholly immaterial.

Held, also, that it was not error to permit the witness by other circumstances and events to fix the date when the accused passed with his team. Whether it was satisfactorily fixed was a question for the jury.

Held, that the testimony of Handley was competent. It was important as tracing and identifying the boards, from which the blood was taken, as the same on which the dead body was carried from the barn to the river.

Held, that the proof of finding blood on timbers and boards in barn, six months after the alleged murder, was material. It tended to corroborate the accomplice as to the manner in which, and the course by which, the body was taken from the place of killing to the hay loft. The weight of the evidence was for the jury.

Held, also, that the admission of evidence as to the fact that the accused turned pale at the time of his arrest, was not error. Whether it indicated guilt or not was for the jury to decide.

Held, that the objection to the evidence of Dr. Richardson as to his treatment of the chips from the boards taken from the sleigh of the accused was properly overruled. There was evidence showing that hogs had been dressed upon these boards a day or two after the murder; and there was evidence that the blood of men and hogs were distinguishable, and both were upon these boards. The jury had to find upon these questions.

Held, that proof of the watches carried by the murdered man, shortly before the murder, and that one of them was in possession of the accused a few months thereafter, was proper. Possession of the fruits of a robbery or of the goods of a murdered man soon after the crime, is, unexplained, very persuasive evidence of the guilt of the one so found in possession of the goods. It is impossible to prescribe any definite rule as to the time beyond which a party accused of crime shall not be called upon to account for the possession of property stolen or taken from a murdered man.

Held, that the objection to the evidence of the wife of the accomplice as to the fact of his absence from the house as he testified, was properly overruled. It was a part of the *res gestæ*, and did corroborate the witness in a material fact and was consistent with the entire statement made by him. It being merely a rule of practice, and not of law, that an accomplice should be corroborated to justify a conviction upon his evidence, it is not essential that the confirmation when offered should point directly to the defendant, if it is of any part of the material statements of the witness, the question being in all cases whether the jury under all the evidence will believe the uncorroborated part of the testimony.

(See Code of Criminal Procedure, § 399.)

Held, that the testimony in relation to the movements of the accomplice Vader between the nineteenth and twenty-fifth of December was material and the objection thereto was properly overruled. This evidence was in reply to evidence given on the part of the accused. *Lindsay v. The People*, 242.

32. The prisoner was permitted to prove threats and acts of violence toward himself, by the deceased, and that the general character of the deceased was bad, and that he was very quarrelsome and vindictive. The accused then offered to prove that before deceased came to the prison, he was engaged in several fights, in each of which he used a knife, and cut his opponent. He also offered to prove the declarations of the deceased in regard to cutting people with razors, and that all these had been communicated to the prisoner. They were excluded by the court and the counsel for the prisoner duly excepted.

Held, that even if the proof given of the general character of the deceased was competent upon the facts of the case, there is no authority for holding that proof of specific acts of violence upon other persons, no part of the *res gestæ*, and in no way connected with the prisoner, was competent.

On the part of the prisoner a witness testified that he heard the deceased say to the prisoner if he ever crossed his path again he would fix him. The accused then offered to show that another person who was present at that time stated to him what the deceased had said on that occasion. This offer was excluded and an exception taken.

Held, that there was no error in the exclusion of the offer. It was an offer to prove a threat which the prisoner had already shown was made to him, and of which, therefore, he had information.

A witness testified that the prisoner, so far as he knew, was a quiet man, and good natured.

The question was then asked : " State what his disposition was when crossed or misused ? " It was properly excluded. It was not competent.

The prisoner was allowed to give evidence of the general bad character of the deceased before he came to the prison ; that he was quarrelsome and vindictive. The prosecution then produced several witnesses who had known the deceased in prison, who testified under objection, that as to quarrelsomeness and vindictiveness, his character was good.

Held, that such evidence was competent. The prisoner had attacked the character of the deceased, and thus raised that issue ; it was, therefore, proper that evidence should be received on the other side. It was competent for witnesses to speak of the character of the deceased where they had become acquainted with it ; the weight to be given to it is another question.

The prisoner's counsel excepted to that part of the charge wherein the judge stated to the jury that the deadly weapon furnished some presumptive evidence and the manner in which it was used, some presumptive evidence of an intent to take life ; and also to that part of the charge which stated that the fact that the prisoner used a deadly weapon and struck a blow at the vital part of the deceased are circumstances which furnish presumptive evidence of an intention to take the life of the deceased.

Held, that the exception was not well taken. The charge related to the fact of killing and the intention to kill. The manner in which the prisoner plunged the knife into what he knew to be the vital part of the body of the deceased

raised the presumption that he intended to take life. The natural result of such an act would be to destroy life, and the law presumes he must have intended the natural consequences of his act. *Thomas v. The People*, 298.

33. The prisoner was convicted at a criminal term of the Superior Court of Buffalo of the crime of subornation of perjury. On the trial the people called as a witness one Frederick Vorst. The counsel for the accused objected to any testimony being given by Vorst, on the ground that he had been tried and convicted of the crime of perjury, and that he was made incompetent as a witness by statute.

It was shown by record evidence that Vorst had been indicted and put on trial for perjury; that a jury had found a verdict of guilty against him, and that he was then in custody awaiting sentence upon the verdict. The court allowed Vorst to testify, on the ground that the rendition of a verdict of guilty by the jury did not bring the case within the statute, and that he was not incompetent as a witness until the judgment of the court had pronounced sentence upon him.

Held, that until a person, found guilty of perjury by the verdict of a jury, has received judgment and sentence from the court, he is not incompetent to speak as a witness. *Blaufus v. The People*, 306.

34. The accused was convicted of a felonious assault upon one Taylor with a pitchfork, a sharp, dangerous weapon. The offence alleged was created by chapter 74, of the Laws of 1854.

It appeared on the trial that a controversy existed between Filkins, the accused, and one Carpenter in respect to several mules. Filkins claimed them in right of, and as agent or bailee of his wife, the general owner. Carpenter claiming a lien upon them for their keeping. Filkins was the tenant in possession of the premises, and thus in actual possession of the mules. The mules had been kept by Carpenter, under an agreement with Filkins, and there were several hundred dollars due in arrears for their keeping. At the time of the affray, during which the alleged assault was made upon Taylor, Carpenter had, in the absence of Filkins, gone to the barn with men and boys, including Taylor, with the intention of taking possession of and removing the mules by force. Filkins came upon the ground and discovering what was being done opposed force by force, and the assault alleged was the result. Filkins found Taylor in the act of taking one of the mules from the stall, and with a pitchfork which he had in his hand struck him twice on or over the head. The blow was made as with a club and not by pushing or thrusting with the tines.

Held, that as used the weapon was not a sharp and dangerous one, and not within the statute.

On the trial the accused offered to prove the ownership and his possession of the mules. The evidence was excluded. It was further offered by the accused, to prove that Carpenter with the complainant were trespassing, and that the accused was only endeavoring to protect his property. The court rejected the offer. The judge was asked if he still persisted in his ruling out evidence of the ownership of the property, to show a right to resist, and a justification in the use of force, and he replied that he did persist in so ruling. To each of these rulings and decisions there was a distinct and several exception.

Held, that in the exclusion of this evidence, there was manifest error. The

right of property and to the possession of the mules was at the foundation of a justification or excuse for any assault, or the resort to any violence or force to prevent their removal. The assault upon Taylor was professedly in defence of property, and the affray grew out of the rival claims of the contestants. The proof offered was competent to enable the jury to determine who was the aggressor, and whether the force used was justified. If the intention was merely to defend the possession of the goods, and there was no malicious intent, the offence was not within the statute of 1854. *Filkins v. The People*, 311.

35. The court allowed the prosecutrix, under objection, to swear that her father and mother were both dead and when they died.

Held, that the evidence was not of great importance to the case of the people, but the admission of such testimony was not improper.

The complainant was allowed to testify in regard to a conversation, she said was held in October at the house of Gaylord, after the illicit connection.

Held, that such conversation was part of the *res geste*. Like any other conversation or declaration of the accused upon the subject-matter, it was competent. The prosecutrix was called from her bed by the accused, late in the evening—this shows intimate and yielding relations on her part—and as to this fact she is supported by other evidence.

The prosecutrix was allowed under objections and exception, to answer the question, "Did you believe him when he had connection with you, that he would marry you?" The answer was: "Yes, sir."

Held, that this allowance of the question was proper. The question at issue was, whether the consent of the prosecutrix was obtained under and by reason of the promise of marriage.

On the trial the prosecutrix testified that the illicit intercourse took place at the house of Dr. Kimball, on August 5th, 1875. She was then asked by the district attorney to go on and state in her own way what occurred on that evening. To this the counsel for the prisoner objected, and the court overruled the objection.

Held, that the evidence was material and admissible. It was of the very gist of the crime alleged, that she was thus directed to speak, and there was no better way, than for her to relate the story of it without prompting or hindrance from questions.

The prosecutrix, on the trial, was permitted by the court, under objection, to testify that she was at that time in a family-way.

Held, that there was no error in this ruling. She being, and having always been, an unmarried woman, the fact of pregnancy was positive proof of illicit connection with some one. It did not fix the accused as a participant therein; but it was a fact in the case, not incompetent to be made known to the jury.

It was urged by the counsel for the accused that the evidence of the prosecutrix was not supported by other evidence.

Held, that it is settled, by the authorities, that the supporting evidence is required as to two of the matters named in the act of 1848, and as to them only. They are the promise of marriage, and the carnal connection. Both these may be determined by the jury from the facts shown on the trial. In this case there was some supporting evidence furnished; it was for the jury to determine its strength.

Mr. Parsons, who had acted as attorney for the prosecutrix, was examined out of court, and his examination offered in evidence. The question put to Mr. Parsons, "whether he obtained from the prosecutrix, the facts stated in a complaint in a suit by her for breach of promise of marriage," was objected to by the people and the witness, that the communication was a privileged one from client to counsel. The complaint was not sworn to nor was it read over to her after it was made out. The court ruled the answer out.

Held, that the ruling was correct.

On the trial the accused and other witnesses testified to an *alibi*, and the court in his charge said to the jury, that if they were satisfied from this evidence that at the time the prosecutrix testified to, the accused was not there, that that fact disposed of her evidence. The court added: "But it is proper for me to remark that, no matter when it"—the illicit intercourse—"did take place, provided it was after the promise of marriage, and the consent, on her part, was in consequence of the promise of marriage."

Held, that as a legal proposition, this cannot be deemed objectionable.

The court charged, and to which exceptions were taken, that if the connection took place after the promise of marriage and in consideration thereof, that it was immaterial whether the promise was made in May or afterward, if it was before the seduction; that the promise might be made and the connection take place afterward, and the crime be committed, if that connection was in consequence of that prior promise; and that the jury, in the opinion of the court, would be justified in finding a promise from her evidence if it was supported, and, that if the promise of marriage was made, as testified to by her, that was sufficient under the statute.

Held, that there was no error in the charge as made.

Church, Ch. J., dissented, on the ground of a want of corroboration as to the intercourse. Corroboration by opportunity and the like may be sufficient, but having fixed time, place and circumstance, if these are not supported by any evidence, but contradicted by all the evidence, the prosecutrix is not sustained or corroborated by proof that intercourse was possible on some other occasion than that testified to by her. The question is not, whether she ought to be credited, but, whether she is supported by other evidence. *Armstrong v. The People*, 817.

36. Objection was taken to the evidence given by the prosecution that the seller had no license.

Held, that such proof was not required to be given to make out the case on the part of the people and, therefore, if defective testimony had been given, it could work no possible injury to the accused.

An exception was taken to the refusal of the court to charge the jury that they must acquit the accused, because the prosecution failed to prove that the wine sold was of an intoxicating nature.

Held, that the instruction was properly declined. The statute does not require that to be shown in order to create the offence charged. The law in direct terms, prohibited the sale of *wine* in quantities less than five gallons at a time, to be drank on the premises of the seller, when it was made without license. This included *all wines* used for drink. *Schwab v. The People*, 354.

37. The prisoner was tried and convicted, in the Court of General Sessions of the county of New York, for grand larceny, and sentenced to the State prison for the term of five years. The facts shown upon the trial were, that by means of a trick or device the owner of eight hundred pounds of butter was induced to send it by express and steamer, from Alton, Wayne county, to New London, in Connecticut, addressed to Peter Y. Clark & Co., and to draw a sight draft for the amount of the price on A. A. Greeley & Co., at Middletown, in the same State. The butter reached New London and from there it was sent to New York city, and went into the possession of the accused. The prosecution attempted to show that the firms named as purchasers of the property and drawee of the draft, were fictitious, and did not exist at the time when the property was ordered and sent forward. To prove this the people produced as a witness, Bradshaw, the complainant. Under objection, on the part of the accused, he testified, in substance, that the day preceding the trial, he went to New London and Middletown, and made inquiries, and from those inquiries, ascertained that neither of these firms existed, either at the time, or when the butter was ordered. The court remarked that this testimony was admissible, to which decision an exception was taken.

Held, that the admission of such evidence was a fatal error. The evidence given by the witness as proof of facts, was not his own observations or knowledge, but simply the unsworn statements and reports of other persons, who were not before the court, and could not be examined or cross-examined to determine the accuracy of what they had related. To allow evidence of that description as proof of material facts, would be unjust to the accused, and would subject him to a trial by witnesses not confronted by him and without even the semblance of an oath or affirmation. The question was whether what the persons stated to Bradshaw was true; not whether he truthfully repeated what they had said to him. It was a trial of the accused upon what the law denominates hearsay evidence. *Wiggins v. The People*, 366.

38. On the trial the accused was sworn in his own behalf, and upon cross-examination the counsel for the people was permitted, under objection, to question him as to other altercations in which he had been engaged, and other assaults which he had committed.

Held, that this permission was not objectionable. When a prisoner offers himself as a witness, in his own behalf, he is subject to the same rules upon cross-examination as other witnesses. He may be asked questions disclosing his past life and conduct, and thus impairing his credibility. The extent to which such an examination may go to test the witness' credibility is largely in the discretion of the trial court. In *The People v. Irving*, 2 N. Y. Crim. Rep., 171, that principle was recited and affirmed. *The People v. Casey*, 371.

39. *Held*, that the testimony of the conversation with the accused at Jersey City, was properly received. Though it did not particularize this draft, it did show circumstances which might, by inference, include or refer to this. *Phelps v. The People*, 383.

40. The defendant had a separate trial, and George Jones, who was jointly indicted with the defendant, was sworn, under objection, as a witness on that trial.

Held, that he was a proper witness on the defendant's separate trial.

On the trial the defendant was sworn on his own behalf, and denied his guilt. For the purpose of affecting the credibility of the defendant as a witness, there was received in evidence a record of conviction of the defendant for larceny, second offence, on plea of guilty.

Held, that such evidence was properly received, for the purpose of affecting the credibility of the witness. Such evidence was held admissible in *Carpenter v. Nixon*, 5 Hill, 280; *Lake v. The People*, 1 Park. Cr., 495, 523, and in *Newcomb v. Griswold*, 24 N. Y., 298. *The People v. Satterlee*, 438.

41. The accused was indicted and tried in the Territory of Utah, for the crime of murder in killing one John Kramer, commonly called Dutch John, and the jury rendered a verdict of murder in the first degree. Sentence in due form of law was rendered by the court.

The prisoner excepted to the rulings and instructions of the court, and appealed to the Supreme Court of the Territory, where the judgment of the subordinate court was affirmed. The prisoner sued out a writ of error, and removed the cause into this court.

Held, that sect. 8 of the act of Congress of June 23, 1874 (18 Stat. 254), allows a writ of error from this court to the Supreme Court of the Territory of Utah, where the defendant has been convicted of bigamy or polygamy, or has been sentenced to death for any crime.

The principal error assigned by the accused and the only one upon which this appellate court passed is, "That the court erred in sustaining the ruling of the District Court, that the uncommunicated threats of the deceased, made in connection with the exhibition of a pistol a short time before the homicide, were inadmissible in evidence to the jury." The testimony which was ruled out by the trial court and upon which this assignment of error is based is as follows: "The defendant, on the trial of this cause, called Robert Heslop as a witness in his defence, who testified:

"That, just a short time before the shooting, the deceased showed him a pistol which he (deceased) then had on his person. Deceased, at this time, was sitting on a box on the opposite side of the street from the Salt Lake House, and in front of Reggle's store.

"The prosecuting attorney admitted that this was after the deceased was ejected from defendant's saloon.

"Whereupon the counsel for the defendant asked witness the following questions:—

"What, if any, threats did the deceased make against the defendant at this time? which was objected to by the prosecuting attorney, for the reason it was immaterial.

"The objection was sustained by the court, and the defendant, by his counsel, then and there duly excepted.

"Defendant's counsel then asked witness, what, if anything, did deceased then say concerning the defendant.

"(Objected to by prosecuting attorney as incompetent.)

"Defendant's counsel thereupon stated that they expected to prove by this witness that in that conversation, a short time prior to the killing, the deceased, in the hearing of the said witness, made the threat that he would kill the defendant

before he went to bed on the night of the homicide, which threats we cannot bring home to the knowledge of the defendant.

"Which was objected to by the counsel for the prosecution, because it was incompetent.

"The objection was sustained by the court, to which the defendant then and there excepted.

"This witness and several others, testified that the deceased's general character was bad, and that he was a dangerous, violent, vindictive and brutal man."

Held, that the rule in regard to the admission of threats of the deceased against the prisoner in a case of homicide, where the threats have not been communicated to him, established by the decisions of courts of high authority is : "Where the question is as to what was deceased's attitude at the time of the fatal encounter, recent threats may become relevant to show that this attitude was one hostile to the defendant, even though such threats were not communicated to defendant. The evidence is not relevant to show the *quo animo* of the defendant, but it may be relevant to show that, at the time of the meeting, the deceased was seeking defendant's life."

Held further, that evidence of uncommunicated threats are always admitted in the trial of an indictment for murder, when it appears that other evidence has been introduced tending to show that the act of homicide was committed in self-defence, and that the evidence of such threats may tend to confirm or explain that defence, and in the state of mind produced on the jury by the other testimony produced, have turned the scale in favor of the defendant. In the condition of the testimony as it stood in this case the questions and offer were relevant to the issue, and should have been received. *Wiggins v. The United States*, 443.

42. The accused was tried and convicted in the Court of Sessions in and for the county of New York, of the crime of obtaining goods by false pretences. The General Term affirmed the conviction and from that affirmation the accused brings error.

The indictment charged that the prisoner represented, among other things, that the check was good and a valuable security, and of the value of \$255; whereas it was not good, or of any value whatever.

The evidence was, that after bargaining for the goods, Melville the confederate went out as he said to get money to pay for them. While Melville was away the accused said to complainant that Melville was a man of business having two stores. Melville returned with a check post-dated. Melville said it was too late to go to the bank that day, when the prisoner said that the check was good, and also that Steinbach, the maker of the check, "had a business." The evidence also showed that no such person as the drawer of the check kept any account in the bank on which it was drawn. It was admitted on the trial by the accused that the check was worthless. The defendant relied solely on the fact that the check was post-dated.

Held, that the evidence was sufficient to justify a finding that the prisoner represented that the check was good, and the maker a man of substance; while he knew that it was worthless, and that it was a false token got up for the purpose of defrauding the prosecutrix, and that the accused and Melville were confederates, and jointly obtained the goods. *Lesser v. The People*, 467.

43. There was an objection made that there was no proof that the child was living at the time of the operation.

Held, that the evidence in the case shows that the doctress who saw the foetus a few hours after it was brought into the world, gave it as her belief, as an expert, that it was then alive. The case on this point was rested on her evidence, and we cannot say that there was no evidence on the subject. *Hawker v. The People*, 524.

44. The Court of Sessions of the county of Cayuga convicted the accused of the crime of obtaining property by false pretences.

The indictment charged that the accused obtained from one John Molley bank notes of the value of \$300, upon the false and fraudulent representations and pretences, that he brought \$50,000 ready money to Port Byron, and, that he was the owner of a house and lot in Watertown, free from incumbrance, and worth \$40,000. The indictment alleged that the accused had no ready money at Port Byron, and that said house and lot was incumbered to its full value.

The evidence on the part of the people, showed that the accused, who was a banker at Port Byron, induced the complainant by the false pretences named, to deposit currency in his bank; that the money so deposited was drawn out by the complainant some weeks afterwards; and that subsequently the complainant deposited for collection a draft, the larger part of which was unpaid when the bank closed.

The counsel for the accused moved his discharge, on the ground that no offence was shown to have been committed. The motion was overruled, and an exception taken.

Held, that the motion was properly overruled. The fact that the money deposited was paid back went to the question of intent. If the jury were satisfied by the evidence, that the deposit was induced by the false representations in the indictment, with the intent to deceive and defraud, the offence was made out. The payment may have been made in the expectation that it would further the original fraudulent design, by leading on the complainant to make other deposits, partly on the faith of the original representations.

On the trial the court received, under objection, the admission of the accused that his house and lot in Watertown were incumbered by mortgage.

Held, that this admission was error. The existence of the incumbrance was a material fact for the prosecution to prove. Without accounting for the absence of the mortgage, the record, or a certified copy, secondary evidence is not admissible. The rule is, that the admissions of a party are competent evidence, only when parol evidence of the fact sought to be shown by such admissions would be competent.

The court allowed the witness Sears to testify, under objection, that the accused said to him in June, 1876, that he brought to Port Byron \$50,000 in currency for banking purposes.

Held, that this testimony was improperly received. The testimony of Sears did not tend to prove other acts of fraud, for it did not appear that Sears was induced by such statements to do anything, or that they were made for the purpose of inducing him to do anything, or that any action on his part was contemplated when the statements were made. There is nothing in the testimony of Sears from which it can be inferred that the statements made to him were

made with a fraudulent intent, and consequently they throw no light upon the *quo animo*. *Sherman v. The People*, 539.

45. It appeared on the trial by the testimony of the child assaulted, that she consented to the acts done by the accused, and his counsel insists that where there is consent there cannot be, in law, an assault.

Held, that a female child, under ten years of age, is incapable in law, of consenting to the act which constitutes rape under the statute, and hence, the question of consent becomes wholly immaterial on the trial of an indictment, either for the principal offence, or for an attempt to commit the crime. In changing the common law of rape, in such cases, the legislature necessarily changed the offence of assault with intent to commit the crime, so far as it could be affected by proof of consent by the infant. *Singer v. The People*, 547.

46. On the trial, in order to prove the conspiracy between the accused, the district attorney, under objection, was allowed to put in evidence the minutes of a justice of the peace, before whom Stone was examined, after his arrest for the conspiracy of the accused to defraud complainant. The examination was had in February, 1876, and the transaction in reference to the tobacco was closed before the 10th of November, 1875, as at that time the whole of this tobacco was paid for by the complainant.

The counsel for the accused objected to the reception of this evidence, on the ground that the statements offered were not a part of the *res gesta* and, therefore, the deposition of Black was not evidence against Stone, nor that of Stone against Black.

Held, that without the deposition of Stone, Black could not have been convicted, and the deposition of Stone was incompetent as evidence against Black, for it was given long after the accused had ceased to act in furtherance of the purposes of the conspiracy. For the same reasons the deposition of Black was not evidence against Stone. *Stone v. The People*, 553.

EXCISE.

1. The defendants were appointed Commissioners of Excise of the city of Schenectady within ten days after the passage and under the provisions of the act of 1870, chap. 175, Laws of 1870. On the first day of April, 1873, Dorn, McClyman and Palmer were appointed commissioners by the mayor alone. Defendants claimed that such appointments were invalid, and on that account claimed to hold over.

Held, that the rule of the statute is for the mayor to appoint in all the cities, except New York and Brooklyn, and the provision for the subsequent appointments, was intended to confer the power upon the same officers, and the language should be construed as though it had read, the same officers shall appoint in the manner above described. There is no reasonable doubt of the intent of the legislature. "It is not the words of the law, but the internal sense of it, that makes the law; the letter of the law is the body, the sense and reason of the law is the soul." *The People v. Gutes*, 67.

2. The prisoner was indicted and tried, before the General Sessions of Saratoga county, for a violation of the excise law in selling strong and spirituous liquors,

wines, ale and beer, in quantities less than five gallons, by retail, without a license, to be drank in his house. The evidence on the part of the prosecution was, that the defendant kept a saloon and sold ale on draught to be drank on the premises.

The defence offered in evidence a license granted to him by the board of commissioners of excise, covering the time laid in the indictment for the commission of the offence. The license authorized the defendant "to sell and dispose of strong and spirituous liquors, wine, *ale and beer*, in quantities less than five gallons," at his saloon.

The trial court held, that such license afforded no justification or protection to the defendant, and excluded the evidence.

Held, that the license offered in evidence afforded a justification of the sale proved against the defendant on the trial, and its exclusion was erroneous. The license was good to the extent the board had authority to license, and it is plain that it was intended by the board to grant the privilege to the licensee to sell ale and beer. Such intent appears on the face of the license; it grants the right in express terms. It does not follow that if inoperative in part, it is therefore void *in toto*. By the amendment of 1869 full power was conferred upon the board of excise to grant a license to sell ale and beer to be drank in the saloon of the plaintiff in error. *O'Rourke v. The People*, 159.

3. The accused was indicted and tried, by the Court of Sessions of Monroe county, for a misdemeanor in having sold intoxicating liquors and wines on Sunday, contrary to the provisions of the Laws of 1857, as amended by § 5, of chapter 549, of the Laws of 1873. On the trial the accused admitted that, on the days charged in the indictment, he sold lager beer by the glass as a beverage, pleading a license under the excise law.

The testimony on the part of the people, tended to prove that lager beer was intoxicating.

The judge charged the jury that, if they found lager beer to be intoxicating, they should convict the accused. To this charge the counsel for the accused excepted. The jury found the defendant guilty.

Held, that the claim of the accused, that the sale of lager beer on Sunday is not prohibited by the excise law of 1857, as amended in 1873, is not tenable. The plain and obvious intention of the section is to prohibit the sale of all intoxicating liquors, and when the liquors are not such as are known to the courts to be intoxicating, their character as intoxicating or not must be determined, upon competent evidence, as a question of fact.

Held, that the suggestion of the counsel for the accused, that by the omission of the words "ale or beer," in the section under consideration, the legislature manifested an intention to omit from the prohibition lager beer, cannot be upheld by the general rule of construing statutes. The main idea of all of the provisions of this act, as evidenced by its title, was "to suppress intemperance, and to regulate the sale of intoxicating liquors," of all kinds. The law should be construed with reference to other laws upon the same subject, and to the mischiefs intended to be remedied. The law was intended to cover all kinds of intoxicating beverages which were within the mischiefs of the law. *Rau v. The People*, 276.

4. The accused was indicted and tried by the Court of Sessions of Jefferson county, for selling strong and spirituous liquors, wines, ale and beer, in quantities less than five gallons at a time, to be drank on the premises, without having an inn-keeper's license therefor. The jury found him guilty. The Supreme Court reversed the judgment and the people bring error.

It appeared on the trial that the accused did sell intoxicating liquors in the quantities named to be drank upon his premises, and without having a tavern license. It also appeared that the board of excise gave the accused a license to sell on his premises and that such license was granted under the fourth section of the act of 1870. It was claimed by the accused that the act of 1857 was so in conflict with section four that it was repealed and that section four was in force.

Held, that the act of 1857 was not repealed by implication or by express terms, by the act of 1870, only where the provisions of the act of 1857 were inconsistent or in conflict with the provisions of the act of 1870.

Held, that to determine what is repealed is left to the judicial inquiry of what conflicts and what is inconsistent, and the conflict and inconsistency must be plain and unavoidable to make the law of 1857 fall. Take the two acts and read the parts under consideration and consecutively, and they will flow, with some pruning of the verbiage, as one well constructed, consistent enactment, harmonious in all its parts. This being so, the effect of the clause of the act of 1870, that "the provisions of the act of 16th April, 1857, except where the same are inconsistent or in conflict with the provisions" of the act of 1870, "shall be taken as a part of" it, "and be and remain in full force and effect throughout the whole of this State," makes those parts of the act of 1857 in question, in full force and a part of the excise law of the State. *The People v. Smith*, 342.

5. The accused was indicted in the county of New York for selling wine without license, in a quantity of less than five gallons, to be drank upon his premises.

The counsel for the accused claims that the act of April 16, 1857, has been rendered inapplicable to the county of New York.

Held, that while the law passed April 16, 1866, was in force, the act of 1857 was inapplicable, but that law was expressly repealed by section 6 of chapter 175 of the Laws of 1870; and that section declared that the act of April 16, 1857, should be and remain in full force and effect throughout the State, so far as it was not inconsistent or in conflict with the provisions of the act of 1870. The law of 1857, in regard to the objection made, not being inconsistent with the law of 1870, is in full force.

The indictment was in the usual form. It contained the averment in the first count, that the sale was made in the ninth ward of the city of New York, to be drank in the house, store, shop and place of the seller.

Held, that such averment was all that was required in this respect to bring the case within the restraint imposed by the statute. It fully apprised the accused of the nature of the crime charged, and of the time and place where it would be claimed by the prosecution the offence had been committed by him.

Objection was taken to the evidence given by the prosecution that the seller had no license.

Held, that such proof was not required to be given to make out the case on

the part of the people and, therefore, if defective testimony had been given, it could work no possible injury to the accused.

An exception was taken to the refusal of the court to charge the jury that they must acquit the accused, because the prosecution failed to prove that the wine sold was of an intoxicating nature.

Held, that the instruction was properly declined. The statute does not require that, to be shown in order to create the offence charged. The law in direct terms, prohibited the sale of *wine* in quantities less than five gallons at a time, to be drank on the premises of the seller, when it was made without license. This included *all wines* used for drink. *Schwab v. The People*, 354.

6. At the Court of Sessions held in the county of Livingston the defendant was indicted and tried for a violation of the excise law. The indictment charged in the usual form the sale of strong and spirituous liquors and wines, in quantities of less than five gallons at a time to divers citizens of the State.

On the trial it was shown that the defendant had obtained a license on the 15th of July, 1874, commonly known as a storekeeper's license, to sell strong and spirituous liquors, not to be drank on the premises. The sale on the trial was shown to have been made under this license and not to be drank on the premises, and that they were carried off and not drank on the premises of the accused. It was admitted that the sale proved, was within the provisions of the license granted.

The district attorney placed in evidence a record of conviction of the defendant for a violation of the excise law, obtained the 9th of June, 1874, which was for a violation of the law in selling strong and spirituous liquors, ale, wine and beer, in quantities less than five gallons at a time, to be drank on the premises, and claimed that by section 4 of chapter 549 of the Laws of 1873 the license offered in evidence by the accused was forfeited and annulled, and therefore the sale admitted and proved was in violation of the law. The defendant insisted that the conviction alone, did not either annul or forfeit such licence; that it could not be revoked except by the judgment of some competent tribunal. The court held that the conviction of the defendant as proved did not of itself forfeit and annul the license under which the defendant claimed the right to sell spirituous liquors.

Held, that the conviction *ipso facto*, by the express words of the statute of 1873, operates to revoke and annul his license, and it cannot afford the accused any justification or protection.

Held, that the act of 1873, chap. 549, § 4, was intended to superadd to the provision for revoking and annulling licenses, contained in sections 25 and 26 of the act of 1857. *The People v. Tighe*, 427.

7. The accused were tried at a Court of Sessions held in Fulton county, for a violation of the excise law.

After the charge of the court, one of the jurors stated that one of them thought they had better retire. In answer to this the court said that the evidence was uncontradicted and undisputed and that they would not allow the jury to retire. The court then directed the jury to find the accused guilty.

To this direction their counsel excepted.

Under this direction of the court the jury found the defendants guilty of the misdemeanor charged in the indictment, and they were sentenced.

Held, that it was error for the court to direct a verdict of guilty. The defendants were entitled to a jury trial. The right to a trial by a jury means, that the persons indicted are entitled to have the question of their guilt passed upon by the jury. It does not mean that the court is to decide that question. The action of the court below was erroneous in law, and dangerous as a precedent. *Howell v. The People*, 433.

8. The accused was tried in the Court of Sessions of Jefferson county, upon an indictment charging him with selling "strong and spirituous liquors and wines, in quantities less than five gallons at a time," without having a license therefor. There was no allegation in the indictment that the selling was of liquors "to be drank on the premises."

On the trial it was shown that the accused had a storekeeper's license, which authorized him to sell in quantities less than five gallons at a time, but not to be drank on the premises. It was also shown that the accused made sales of liquor, by the glass, to be drank in his store.

The counsel for the accused asked the court to rule: 1st. That the indictment was insufficient, in that it should have been under the fourteenth section of the act of 1857, instead of the thirteenth section. 2d. That the license proved was an absolute protection to the accused for any sales proved.

The court overruled these objections, severally, and the accused excepted.

Held, that the gist of the offence of which the accused was convicted, consisted not of the act of selling, but of the purpose for which the sale was made. He had a license which authorized him to make the sale, but he was prohibited from making any sale of spirituous liquors to be drank on his premises. There is no averment in the indictment that the accused violated that prohibition.

Held, that the selling without a license is a distinct offence from that a person commits when licensed as a storekeeper he sells to be drank on the premises. It is as necessary to aver the illegal purpose of the sale in the latter case, as a want of the license in the former. To make out the offence, it must be proved that the accused not only sold the liquor, but that he sold it to be drank on the premises. Whatever is essential to be proved must be averred.

Held, that the rule of law upon this subject is elementary, and requires that the accused be specially brought within all the material words of the statute, and nothing can be taken by intendment. *Huffstater v. The People*, 436.

FALSE PRETENCES.

1. The prisoner was jointly indicted with two others, for obtaining money by false pretences, from one Catherine Wulff. He was convicted and sentenced.

The indictment alleged several representations and averred that each was false and fraudulent. Direct evidence was given of the falsity of but one.

The court charged, in substance, that it was sufficient to show the falsity of any one of the alleged pretences which induced the complainant to part with her money.

Held, that this was correct. It was sufficient to show that one of the material representations alleged was false and fraudulently made, provided it was proved to the satisfaction of the jury that such representation was a substantial inducement to the parting with the money.

On the trial it was shown, under objection, that the prisoner with one of his co-indictees, practiced the same fraud on another person a day or two prior to the commission of the offence charged in the indictment, in which the prisoner acted the same part played by another of the parties on the occasion of obtaining the money from the complainant.

Held, that the evidence offered and received of previous like transactions of the accused, was given and received to show the *quo animo*, or intent, of the accused in the particular offence charged, and also tending as to show the known falsity of the pretexts upon which the money of Mrs. Wulff was obtained. For these purposes, it was competent. *Bielschowsky v. The People*, 96.

2. The accused was tried and convicted in the Court of Sessions in and for the county of New York, of the crime of obtaining goods by false pretences. The General Term affirmed the conviction and from that affirmation the accused brings error.

The indictment charged that the prisoner represented, among other things, that the check was good and a valuable security, and of the value of \$255; whereas it was not good, or of any value whatever.

The evidence was, that after bargaining for the goods, Melville the confederate went out as he said to get money to pay for them. While Melville was away the accused said to complainant that Melville was a man of business having two stores. Melville returned with a check post-dated. Melville said it was too late to go to the bank that day, when the prisoner said that the check was good, and also that Steinbach, the maker of the check, "had a business." The evidence also showed that no such person as the drawer of the check kept any account in the bank on which it was drawn. It was admitted on the trial by the accused that the check was worthless. The defendant relied solely on the fact that the check was post-dated.

Held, that the evidence was sufficient to justify a finding that the prisoner represented that the check was good, and the maker a man of substance; while he knew that it was worthless, and that it was a false token got up for the purpose of defrauding the prosecutrix, and that the accused and Melville were confederates, and jointly obtained the goods. *Lesser v. The People*, 467.

3. The Court of Sessions of the county of Cayuga convicted the accused of the crime of obtaining property by false pretences.

The indictment charged that the accused obtained from one John Molley bank notes of the value of \$300, upon the false and fraudulent representations and pretences, that he brought \$50,000 ready money to Port Byron, and, that he was the owner of a house and lot in Watertown, free from incumbrance, and worth \$40,000. The indictment alleged that the accused had no ready money at Port Byron, and that said house and lot was incumbered to its full value.

The evidence on the part of the people, showed that the accused, who was a banker at Port Byron, induced the complainant by the false pretences named, to deposit currency in his bank; that the money so deposited was drawn out by the complainant some weeks afterwards; and that subsequently the complain-

ant deposited for collection a draft, the larger part of which was unpaid when the bank closed.

The counsel for the accused moved his discharge, on the ground that no offence was shown to have been committed. The motion was overruled, and an exception taken.

Held, that the motion was properly overruled. The fact that the money deposited was paid back went to the question of intent. If the jury were satisfied by the evidence, that the deposit was induced by the false representations in the indictment, with the intent to deceive and defraud, the offence was made out. The payment may have been made in the expectation that it would further the original fraudulent design, by leading on the complainant to make other deposits, partly on the faith of the original representations.

On the trial the court received, under objection, the admission of the accused that his house and lot in Watertown were incumbered by mortgage.

Held, that this admission was error. The existence of the incumbrance was a material fact for the prosecution to prove. Without accounting for the absence of the mortgage, the record, or a certified copy, secondary evidence is not admissible. The rule is, that the admissions of a party are competent evidence, only when parol evidence of the fact sought to be shown by such admissions would be competent.

The court allowed the witness Sears to testify, under objection, that the accused said to him in June, 1876, that he brought to Port Byron \$50,000 in currency for banking purposes.

Held, that this testimony was improperly received. The testimony of Sears did not tend to prove other acts of fraud, for it did not appear that Sears was induced by such statements to do anything, or that they were made for the purpose of inducing him to do anything, or that any action on his part was contemplated when the statements were made. There is nothing in the testimony of Sears from which it can be inferred that the statements made to him were made with a fraudulent intent, and consequently they throw no light upon the *quo animo*. *Sherman v. The People*, 539.

FORGERY.

1. The fact that the prisoner had the altered note in his possession was fully proved and the only question was as to his knowledge of its character, and his intention respecting it. The prosecution affirmed that he possessed it with the intent to pass it as true. Very strong evidence to show him engaged in this unlawful practice was given, independently of that which arose out of the search of the person of his wife; but the prosecution was not content to rest the case upon that evidence, but persisted, against the prisoner's objection, in showing that she had in her possession engraved figures, cut from genuine bills, suited to the commission of this species of forgery.

There was no other evidence of any concert between the prisoner and his wife, or that they were mutually engaged in altering bank bills, or that either of them had any knowledge of the facts which were proved against the other. Where two persons sustaining the relation of husband and wife are each found doing acts indicating criminal designs of the same nature, there are strong rea-

sons for conjecturing that they are conspiring together ; but it is mere conjecture, and not evidence, even presumptive of the fact. *The People v. Thoma*, 23.

2. The prisoner was tried for forging the indorsement of one Talmy Van Amburgh, upon a promissory note. The defence was, that the prisoner was authorized by Van Amburgh to sign his name, and that he made the signature in question in pursuance of that authority. There was a conflict of evidence on this point, and to establish the guilty intent, the prosecution put in evidence a letter of the prisoner to his father-in-law, John R. Ganoung, admitting that he had made a similar use of his name without authority upon other notes. The judge charged the jury, in substance, that the admissions of the prisoner in the letters, of the use of Ganoung's name, they could consider in determining the intent of the prisoner at the time he indorsed Van Amburgh's name. To this an exception was taken by the prisoner.

Held, that the fact that the prisoner made an unauthorized use of Ganoung's name does not tend to show that he criminally indorsed Van Amburgh's name, or that he knew and understood that Van Amburgh's authority had been withdrawn, or that the signature in question was made with a criminal intent. Following *Coleman v. The People*, 55 N. Y., 81 ; *S. C.*, 1 Cowen's Crim. Rep., 573. *The People v. Corbin*, 45.

3. The prisoner was indicted and convicted of forgery, in passing a counterfeit bill on the Westfield Bank.

Held, that the conviction was error. The admission of evidence to show that the prisoner had passed two bills some two or three days after the transaction for which he was on trial, without showing they were on the same bank, as the one in question, nor even that they were counterfeits, had no legal bearing upon the issue which was on trial. *The People v. Dibble*, 54.

4. The accused was indicted for forgery. Upon his arraignment he demurred to the whole of the indictment, and to each and every count therein.

Judgment was given for the people upon the demurrer.

The indictment contained five counts, and was for forgery in the third degree, in forging and counterfeiting an instrument in writing, purporting to be an account of one Samuel Johnson for alleged services as constable against the county of Saratoga, together with the affidavit and jurat thereto attached, including the certificate of the justice.

The first objection was that the indictment did not contain a criminal offence ; inasmuch as the crime of forgery could not be predicated upon the instrument set forth in the indictment.

Held, that the statute provides, that "every person who, with intent to injure or defraud, shall falsely make, alter, forge, or counterfeit * * * any instrument or writing, being, or purporting to be, the act of another, by which any pecuniary demand or obligation shall be, or shall purport to be, created, increased, discharged or diminished * * * by which false making, forging, altering, or counterfeiting, any person may be affected, bound, or in any way injured in his person or property, upon conviction thereof, shall be adjudged guilty of forgery in the third degree ;" and that it "shall be sufficient, if such intent appear to defraud * * * any county, city, town or village * * * or any person whatever." These provisions are sufficiently comprehensive to

include the instrument in question. It is a writing purporting to be the act of another, by which a pecuniary demand is purported to be created, and by which another might have been affected, and it is alleged that it was falsely made, forged and counterfeited by the defendant with intent to defraud the county of Saratoga. If the instrument was complete in itself, and sufficient on its face to have induced an acceptance and allowance of the account by the Board of Supervisors, so that it might have produced injustice if the fraud had not been detected, it was the subject of forgery under the statute. It is clearly within the letter and spirit of the statute, and would have been sufficient as the foundation of an indictment at common law.

It is objected that each count separately, is bad for duplicity.

Held, that there is no force in the objection. The account and the signatures to the affidavit and jurat, were all essential to the completion of the instrument before it could be properly presented to the Board of Supervisors; and all of them, therefore, constituted but one instrument. *Rosekrans v. The People*, 195.

5. The prisoner was indicted, tried and convicted, for forgery in the third degree.

On the trial it was shown that the prisoner procured to be engraved in the city of New York blank warrants, purporting to be drawn by the auditor of public accounts of the State of Mississippi upon the State treasurer of that State, with a seal. The prisoner signed and filed in the blanks of two of the warrants and shipped them with a book of the blank warrants, with the seal, to Jackson, Mississippi, where the authorities of that State obtained possession of the package. The prisoner was arrested in New York, when he admitted his connection with the scheme. There was no impression of the seal upon the warrant, the subject of the indictment, and for the forging of which he was convicted. It appeared upon the trial, that the warrant was invalid, by the law of the State of Mississippi, without a seal, and that it lacked vitality because it did not purport to be registered. The Recorder charged the jury that upon the indictment the prisoner could be convicted of forgery.

Held, that the rule established in this State, is, that if the instrument be invalid on its face, it cannot be the subject of forgery, because it has no legal tendency to effect a fraud. A statute authorizing an instrument not known to the common law, and so prescribing its form as to render any other form null, forgery cannot be committed by making a false statutory one—not following the statute—even though it is so like the genuine as to deceive most persons. *Cunningham v. The People*, 214.

6. The defendant was indicted for forgery and was tried and convicted in the Court of Sessions of Ontario county. The judgment was reversed by the General Term in the fourth Judicial Department, and error was brought by the People to this court.

Upon the trial the defendant presented himself as a witness in his own behalf, and was sworn. Upon his cross-examination he was asked "How many times have you been arrested?" To this question the counsel for the defendant objected, stating as his objections, that it was incompetent to affect his credibility as a witness; that it tended to degrade the witness; that he was privileged from answering it, as it had no direct bearing upon the issue in the case; and that

better evidence of the fact existed. The court overruled the objection and the witness answered "five times, I believe."

Held, that while it would not be competent to introduce evidence of particular facts to impeach the witness, yet the authorities recognize a distinction between independent evidence introduced for the purpose of impeaching a witness, and the questions which are permitted, in the discretion of the court, to be put to a witness, tending to affect his *credibility*. It was permissible to ask the defendant questions as to particular facts, although such evidence would not be received from impeaching witnesses, but the evidence sought to be obtained must legitimately tend to impair the credit of the witness for veracity, either directly or by its tendency to establish a bad moral character.

Held, that the general rule is, that a party cannot avail himself of an error in allowing or refusing a privileged question put to a witness, yet where the witness is also the party, there is no reason for the application of the rule. By taking the stand as a witness, he is not thereby deprived of his rights as a party, and it follows that his counsel, while he is in the witness-box, has a right to speak for him, and that an error committed by the court against him may enure to his benefit as a party. The witness was privileged from answering the question, and the objection was well taken by his counsel, and the exception is available.

Held, that neither in the *Brandon Case* (42 N. Y., 265), *Connor's Case* (50 N. Y., 240), nor in the *Real Case* (42 N. Y., 270), was this question of privilege presented, or decided. *The People v. Brown*, 363.

7. The accused was convicted by the Court of Oyer and Terminer held in Albany county, of the crime of forgery in the third degree. The General Term of the Third Department affirmed the judgment entered upon such verdict of conviction.

The accused was a clerk of the Treasurer of the State of New York and his duties were to receive moneys and securities belonging to the State, which came to the hands of the Treasurer, and to deposit them in bank; to keep the accounts between the State and the deposit banks, and other banks. The charge was in having made a false entry in a book of accounts kept in the office of the State Treasurer, whereby, in an account in such book between the Treasurer and the Mechanics and Farmers' Bank of Albany, the latter was debited with a deposit or transfer of the sum of \$200,000. The false entry in question was made on the 31st of August, 1873.

The accused was indicted under section thirty-four of 2 Revised Statutes, 673, which provides, that "every person who, *with intent to defraud*, shall make any false entry, or shall falsely alter any entry made, in any book of accounts kept in the office of the Comptroller of this State, or in the office of the Treasurer, or of the Surveyor-General, or of any county treasurer, by which any demand or obligation, claim, right or interest, either against or in favor of the people of this State, or any county or town, or any individual, shall be, or shall purport to be, discharged, diminished, increased, created, or in any manner affected, shall, upon conviction, be adjudged guilty of forgery in the third degree."

The indictment, in some of the counts, charged the alleged false entry to have been made, with the intent to defraud the Mechanics and Farmers' Bank of Al-

bany, and in others, with intent to defraud the people of the State of New York.

It is claimed by the counsel for the accused, that the entry was made for the sole purpose of concealing his previous defalcations, and if made for that purpose he could not be convicted of the crime of forgery ; and that the false entry could not operate to defraud either the State or the bank, and could have no legal tendency to affect any fund, or affect the property, rights, or interests of any one, as the accused never realized, nor could he realize, any sum whatever by making the entry, nor could the State or the bank be losers thereby to any amount.

Held, that this construction of the statute cannot be maintained. The statute requires that the false entry be made with intent to defraud, but it is not necessary that the intent be to obtain money, or cause the loss of money directly by means of the false entry. The words "with intent to defraud" are used as synonymous with the words "with fraudulent intent," or "for a fraudulent purpose," to distinguish the case from one of an erroneous entry, made through mistake or under a misapprehension of a right, or such fictitious entries as are sometimes made for book-keeping purposes, or otherwise innocently. Where the false entry was part of a criminal scheme to conceal and temporarily cover up the defalcation of the accused, there was a fraudulent intent sufficient to satisfy the statute. The entry was made on the 31st of August, 1878, covering up previous offences and enabling the accused to continue in his position until the next October. The jury had a right to infer from the evidence, that the entry was made with intent to enable the accused to retain the fruits of his depredations, or to continue them, and that he had continued them, during this interval. The law would attach to the concealment, the intent to accomplish the result to which it naturally tended.

Objection was made, that the false entry was not set out in words and figures.

Held, that the counts are good, being set out in the words of the statute, but as some of the counts did set out a copy of the entry, and as the verdict was a general one, and there being evidence in support of these last counts, it is sufficient to sustain the conviction.

It was objected to on the part of the accused, that there was a variance between the account set forth in the indictment and as proved upon the trial in regard to the entry of \$125,000.

Held, that such entry was nearly six months previous to the date of the false entry, and as it was wholly immaterial, it could not have misled or prejudiced the prisoner. *Phelps v. The People*, 376.

8. The accused was indicted for forgery in the third degree for executing the following instrument :

"No. —. SARATOGA COUNTY TREASURER'S OFFICE,

Ballston Spa, June 16, 1875.

"In pursuance of a resolution passed November, 1874, by the board of supervisors of Saratoga county, the county of Saratoga promises to pay at the Saratoga County Treasurer's office, on or before the 15th of February, 1876, to the First National Bank of Ballston Spa, or bearer, \$10,000, at seven per cent. interest, value received.

"\$10,000.

HENRY A. MANN, *Treasurer.*"

At the time of the execution of the foregoing paper the accused was treasurer of Saratoga county. This paper was discounted by the payee and the proceeds were received by Mann. It was shown on the trial that Mann had no authority to make or issue such instrument. The accused was convicted at the Washington county Court of Oyer and Terminer. The General Term of the third judicial department reversed the judgment, and the people bring error.

Held, that the statute under which the accused was convicted defines the offence of forgery in the third degree to be, the falsely making or altering, with intent to defraud, any instrument or writing "being or purporting to be the act of another," whereby any pecuniary demand shall be or purport to be created, etc., etc. That the "act" referred to in the statute is the making of the instrument, and that the offence consists in falsely making an instrument purporting to be made by another.

Held further, that the offence intended to be defined by the statute is forgery, and not a false assumption of authority. One who makes an instrument signed with his own name, but purporting to bind another, does not make an instrument purporting to be the act of another. The instrument shows upon its face that it is made by himself and is in point of fact his own act. It is not false as to the person who made it. The wrong done, where such an instrument is made without authority, consists in the false assumption of authority to bind another, and not making a counterfeit or false paper. *The People v. Mann*, 528.

GRAND LARCENY.

1. The Defendant was tried and convicted of grand larceny, in stealing a quantity of pig iron.

Exception was taken to the refusal of the court to take the case from the jury, on the ground that the description of the identity of the property, was too indefinite, vague and uncertain, to convict the defendant upon, and not sufficient in law to be submitted to the jury.

Held, that the testimony of the agent being, that it bore the marks, and presented the appearance of the iron in his possession, some of which had been taken away, and that he did identify the iron, when he saw it the following day after the defendant was arrested, and the uncontradicted testimony that the defendant said he bought the iron of a canal boat captain for fifteen dollars, when its value was shown to be fifty-two dollars, was sufficient to justify the submission of the question of the identity of the property to the jury.

The defendant's counsel requested the court to charge the jury, that the mere possession of the property stolen, was not *prima facie* evidence of the commission of the larceny by the defendant. The court so refused to do, and an exception was taken.

Held, that the possession was so recent and so suspicious, that it was consistent with no other rational conclusion, than that of guilt. "Generally, whenever the property of one man, which has been taken from him without his knowledge or consent, is found upon another, it is incumbent upon that other to prove how he came by it; otherwise the presumption is that he obtained it feloniously." (2 East's Crim. Law, 656.) Its accuracy as a general legal proposition, is sustained by the decision made in the case of *Knickerbacker v. The People*, 1 Cowen's Crim. Rep., 287.

The court declined to charge the proposition, that where a man, in whose possession stolen property is found, gives a reasonable account of how he came by it, the prosecutor was required to show the account to be false.

Held, that while the proposition might be true, as to a large class of cases, the prosecutor cannot be required to show that the defendant's statements are false, as long as the circumstances attending it, are such as to indicate that they are not true. What the law requires, is, that the defendant's statement should be credited where it appears to be probable, and consistent with the facts. The question is one for the jury. *Dillon v. The People*, 25.

2. The accused was tried upon an indictment for grand larceny, convicted, and sentenced to imprisonment for five years.

The prisoner was a jeweler in New York city, and sent, what was known as a memorandum order, to Charles Kuhn & Co., engaged in the same business, for six pairs of gold band bracelets, which were sent to him on that order, by said firm. The order was designed and understood to be an application for the articles mentioned in it, for the purpose of showing them to a customer to select from, who, if he accepted either, the price for that article, with the remainder of the articles, should be returned to the firm filling the order. Neither the articles sent on the order, nor the money for either of them were returned by the accused.

Held, that the title to the property sent upon the order did not pass from the firm of Kuhn & Company to the accused under this arrangement. So long as no sale was made it was not the design of the parties that the title should pass. The prisoner was a mere custodian of the property for the persons sending it to him; and if he acquired that feloniously, for the purpose of depriving the owners of it by means of the artifice he made use of, that was sufficient to constitute the crime of larceny. The felonious acquisition was a question for the jury.

Held, that the distinction between this class of cases, and obtaining money by means of false pretences, consists in the circumstance that in the latter the owner intends to part with his title with the change of custody, while in the former no intention of that kind exists.

On the trial the prosecution was allowed to show, under objection, that the prisoner obtained these articles from the complainants, in the same manner they had procured other articles of jewelry from other parties, appropriating the same to his own use, for the purpose of establishing the felonious intent in obtaining those mentioned in the indictment.

Held, that the intent is the vital fact to be ascertained; and proof of other acts, plainly within one common purpose and design, are received to show the felonious intent. *Weyman v. The People*, 236.

3. The accused were convicted of the crime of larceny. They were indicted for stealing from one Christian Olason, the sum of ninety dollars.

On the trial it was shown that Olason the complainant, and the prisoners, were passengers on the same train; that Lewis, one of the prisoners, engaged Olason in conversation soon after the train started and continued in his company until they reached New York; that on arriving there, at Lewis' suggestion they went to a hotel, where he and Olason left their valises and Olason also left a box; at the instance of Lewis they went for a walk, and during the walk he

informed Olason that he had a check for \$500 which he wished cashed, and went to a building which he called a bank. The bank he said was not open and they took another walk and went into a saloon, where they found Loomis. Lewis asked for two cigars and offered a five dollar bill in payment. The bartender could not change it, when the prisoners, Lewis and Loomis, threw dice to see who should pay for the cigars, and Lewis lost. They then threw dice for five dollars and Loomis lost. Lewis offered to divide with Olason, but he said he would have nothing to do with it. Loomis then put up \$100 as a bet, and, Lewis having but \$10, asked Olason for ninety more so that he could make the bet, saying "I am sure to beat him again, and you can have your money back. If I do lose I have got the check for \$500, and we will go to the bank and get the check cashed, and you can have the money." Upon this Olason let Lewis have \$90. The money was won by Loomis. Olason demanded of Lewis his money. Lewis asked for \$100 more which was refused. Loomis then put up \$100 against what had been represented by Lewis as a check of \$500 and Loomis won. Lewis then said he was not worth a cent, and he and Loomis left the room. Olason saw no more of them until after their arrest. Loomis was searched and a package was found marked on the outside \$500, made up of a one dollar national currency bill, a five dollar bill of the Citizens' Bank, a Confederate States twenty dollar bill and pieces of brown paper inside. There was also found upon him five metal worthless pieces, each representing a twenty dollar coin. On Lewis there was found a pack of three-card monte cards.

The counsel for the accused asked the court to charge the jury that there was not sufficient evidence to warrant a conviction; which was refused and an exception taken.

The court charged the jury: "If you are satisfied from the evidence, beyond any reasonable doubt, that the two prisoners conspired fraudulently and feloniously to obtain the complainant's money and convert it absolutely to their own use without his consent, and that in pursuance of such conspiracy they did feloniously and fraudulently obtain from the complainant the ninety dollars by the means and in the manner and under the circumstances testified to by the complainant with the intention of converting the money absolutely to their own use without his consent and against his will, and that the complainant did not intend to part with his ninety dollars absolutely but only for a short time and only until Lewis could get the check or pretended check cashed, I think you can and ought to convict the prisoners of grand larceny, otherwise that you should acquit the prisoners."

To this charge the counsel for the prisoners duly excepted.

Held, that the prosecutor did not intend to part with the possession or the ownership of the money. It was handed over for a particular purpose, with no intention to loan it, or absolutely to surrender the title.

Held, that the character of the crime depends upon the intention of the parties, and that intention determines the nature of the offence. Where by fraud, conspiracy or artifice, the possession is obtained with a felonious intent, and the title still remains in the owner, larceny is established, but where the title, as well as the possession, is absolutely parted with, the crime is false pretences. The intention of the owner to part with his property is the gist and essence of the offence of grand larceny. *Loomis v. The People*, 270.

4. The prisoner was tried and convicted, in the Court of General Sessions of the county of New York, for grand larceny, and sentenced to the State prison for the term of five years. The facts shown upon the trial were, that by means of a trick or device the owner of eight hundred pounds of butter was induced to send it by express and steamer, from Alton, Wayne county, to New London, in Connecticut, addressed to Peter Y. Clark & Co., and to draw a sight draft for the amount of the price on A. A. Greeley & Co., at Middletown, in the same State. The butter reached New London and from there it was sent to New York city, and went into the possession of the accused. The prosecution attempted to show that the firms named as purchasers of the property and drawee of the draft, were fictitious, and did not exist at the time when the property was ordered and sent forward. To prove this the people produced as a witness, Bradshaw, the complainant. Under objection, on the part of the accused, he testified, in substance, that the day preceding the trial, he went to New London and Middletown, and made inquiries, and from those inquiries, ascertained that neither of these firms existed, either at the time, or when the butter was ordered. The court remarked that this testimony was admissible, to which decision an exception was taken.

Held, that the admission of such evidence was a fatal error. The evidence given by the witness as proof of facts, was not his own observations or knowledge, but simply the unsworn statements and reports of other persons, who were not before the court, and could not be examined or cross-examined to determine the accuracy of what they had related. To allow evidence of that description as proof of material facts, would be unjust to the accused, and would subject him to a trial by witnesses not confronted by him and without even the semblance of an oath or affirmation. The question was whether what the persons stated to Bradshaw was true; not whether he truthfully repeated what they had said to him. It was a trial of the accused upon what the law denominates hearsay evidence. *Wiggins v. The People*, 366.

5. The next question to be decided is, whether there was an actual or constructive possession of the draft in the alleged owner, the State of New York, at the time of the taking.

Held, that when property is received by the servant or custodian from another, who occupies the relation of agent for the owner, or who stands in the position of the owner in respect to the possession; then, though the owner never had the actual possession, yet the possession of such other person is his possession. In this case the draft came into the State hall, and went first to the actual possession of Mr. Gallien, the second Deputy Comptroller. Thus it came into the actual possession of a sub-servant of the State, whose actual possession was the possession of the State, who thereby became the special owner of it. It was sent to the accused by a special messenger, a sub-servant of the State who had actual possession of the draft, thus the actual possession of the messenger was the possession of the State, and the delivery of the draft into the custody of the accused for a special purpose, was a delivery by the State to him for that purpose. Thus, he had only the custody or charge of the draft, and if the taking of it by him from the messenger was not a trespass, the carrying it away, having only the bare custody of it, was, and if that carrying of it away was with felonious intent, as the jury have found that it was, it was larceny, for, when the owner has parted with the custody only of the property, and not with the possession, and the servant converts the chattel to his own

use, it is larceny, though he had no felonious intent when he received it into his custody.

Held, that the draft was a legal, operative instrument when it reached the hands of the accused ; it had been by the original payee indorsed to Mr. Hopkins, as Comptroller. *Phelps v. The People*, 383.

HABEAS CORPUS.

1. The General Term of the Supreme Court, in the Second Judicial Department, dismissed a writ of *certiorari* brought to review a decision on a writ of *habeas corpus* issued upon the petition of the relator remanding him to the custody of the Warden of the State prison at Sing Sing.

On the 6th day of January, 1873, Stokes, the relator, was adjudged guilty of murder and sentenced to be hung on the twenty-eighth day of the next month, February. The relator brought his writ of error, the execution had been stayed, the judgment on the 10th of June, 1873, was reversed and a *venire de novo* ordered. On the 29th of October, 1873, the relator was again tried and convicted of manslaughter in the third degree. On that day he was sentenced to State prison at Sing Sing for the term of four years. In the meantime he had been imprisoned in the jail of New York county. His first day of confinement in the State prison was the first day of November, 1873. It was certified by the warden of the prison that his conduct from the 1st day of November, 1873, to the date of the certificate, 14th Jan. 1875, had been good, and in adherence and obedience to the prison officials and discipline. On the 5th of February, 1876, he was, by *habeas corpus*, brought out of prison and asked for his discharge from imprisonment. The request was denied, and he was remanded.

The relator claims that the time he was in jail in the city of New York should be taken as part of the four years of his sentence, and also, that he had earned by good conduct, while in State prison, an abatement from the term of his sentence ; both equalling four years.

Held, that punishment for crime is that pain, penalty or forfeiture which the law exacts, and the criminal pays for the offence. Punishment is the immediate consequence of a conviction for crime. The pain or penalty which the relator suffered in jail was before conviction and sentence, it was not based upon the judgment of a court or jury ; he was not serving any part of his sentence ; he was not in State prison ; he was not at hard labor ; he was held by the requirements of the law which prescribes, that persons indicted for murder may be kept in close custody until their trial for that crime is ended. *The People v. The Warden*, 264.

HIGHWAY.

1. The accused was indicted in the Oyer and Terminer of Jefferson county, for unlawfully obstructing a public highway, or street, in the village of Carthage in said county. The indictment was sent to the Court of Sessions of Jefferson county where the accused was tried, convicted, and sentenced.

The accused erected an office and barn and piled logs and lumber within the limits of the alleged highway, and such acts constituted the obstructions.

On the trial, the following testimony was taken :

The district attorney proved that in August, 1858, Sanford Lewis, Wm. D. Lewis and Charles Sarvoy were commissioners of highways of the town of Wilna, and that a paper produced had been taken from the office of the town clerk of said town and that the signatures to said paper were in the handwriting of said commissioners. The paper produced was marked as filed Feb. 1st, 1859, in the handwriting of the then clerk of said town. That paper reads as follows: "A survey of a road or street from Furnace street to Guyot's and Davis Mills, beginning at a hub on the northerly margin of Furnace St. 25 links easterly from the point where the easterly margin of Water street intersects with the northerly margin of Furnace street, thence in a direct line towards the S-Ely corner of Guyot's gristmill N. 45½ west, 2 chs. 21 lks. to a hub 57 lks. S. 4½ E. from said S-Ely corner of said gristmill as surveyed by A. Brown, August 30th, 1858.

The above street is to be three rods wide.

SANFORD LEWIS,
WM. D. LEWIS,
CHARLES SARVOY,

Commissioners of Highways."

The signatures of the commissioners are not on the same paper as the survey, although there was room enough on that paper for their signatures, but on paper different in color and of inferior quality. This paper was annexed to the survey by three wafers.

Two of the above named commissioners swore, upon the trial of the case, that they had never signed the annexed paper when attached to the survey, and had never authorized it to be so attached, and that they had never attended a meeting of the commissioners when an order for laying out the highway was made.

The counsel for the accused asked the court to hold that from the testimony of the two commissioners and the appearance of the paper, there was no evidence to show that the *locus in quo* was a public highway. The court held that the paper was sufficient to show that the highway had been laid out. To this ruling an exception was taken.

Held, that assuming the paper found on the files of the town clerk was presumptive evidence of the laying out of the highway, it was competent for any person interested to prove that it was not legally laid out, and thus overcome the presumption.

Held, that from the evidence of the commissioners given upon the trial, and from the appearance of the paper on which the names of the commissioners were written, the presumptive evidence of the laying out of the highway in question was entirely overcome, and the finding of the jury that the paper relied upon was an order laying out the highway, was without evidence to support it.

Held, that the paper, Exhibit A, was not a valid order for laying out the highway. It was not made in compliance with the Revised Statutes. 2 R. S., 5th ed., 394, § 70. That section reads: "whenever the commissioners of highways shall lay out, alter or discontinue any road, either upon application to them or otherwise, they shall cause a survey to be made of such road, and shall incorporate such survey in an order to be signed by them and to be filed and recorded in the office of the town clerk, who shall note the time of recording the same."

Held that, in this case, the survey was not incorporated in an order signed by the commissioners, and hence the requirement of the statute was not complied with. The omission to incorporate the survey in an order was fatal to the laying out of the road. *Pratt v. The People*, 548.

INDICTMENT.

1. The prisoner was convicted under the provisions of the statute "for the better prevention of the procurement of abortions," Chap. 181, Laws of 1872.

The indictment contained three counts: The first two charged the advising and procuring one Clara Pensy to submit to the use of an instrument by one Crandall, with intent to procure a miscarriage, thereby causing the death of the mother and child. The third count charged the same and that said defendant advised and procured said Clara Pensy to take certain drugs and medicines with like intent. The indictment further charged the offence to have been committed in Madison county, within 500 yards of the boundary line between Madison and Otsego counties.

After the jury had been sworn, and before the case had been opened on the part of the people, the counsel for the prisoner moved to quash the indictment on the grounds: First, that the offence was alleged to have been committed in the town of Brookfield, in the county of Madison. Second, to quash the third count on the ground that it contained two distinct and separate offences, and was bad for duplicity. Both motions were denied.

The counsel for the defendant then asked the court to compel the district attorney to elect upon which count he would try the defendant. This was also denied.

The jury rendered a general verdict of guilty, and the counsel for the defendant moved in arrest of judgment on account of the alleged defect in the third count.

Held, that the statute provides that where an offence shall be committed on the boundary of two counties or within 500 yards of such boundary, an indictment for the same may be found and a trial and conviction thereon may be had in either of such counties. It is sufficient if the indictment shows jurisdiction in the grand jury by which the indictment is found, over the offence, and the jurisdiction of the trial court to hear and determine it.

Held, that the motion in arrest of judgment was properly denied. The verdict was general, finding the accused guilty upon all the counts. The indictment contained two counts confessedly good; this will sustain the conviction, irrespective of other defective counts.

Held, that the denial of the motion to quash the third count, or to compel the prosecution to elect upon which offence he would proceed, was not error. The denial of this motion was not the proper subject of an exception. The accused has not the legal right to have the sufficiency of an indictment, or of any count therein, determined upon motion to quash or set it aside; or to put the prosecutor to an election, when more than one offence is charged, upon which he will proceed. It is in the discretion of the court whether or not to set aside a defective indictment upon motion; and unless the question is free from doubt, the court ought not to do it, but leave the counsel to his demurrer, or motion in arrest of judgment.

Held, that section 1, chapter 181, Laws of 1872, provides that any person who shall thereafter wilfully administer to any woman with child, or prescribe for any such woman, or advise or procure her to take any medicine, etc., or shall use and employ or advise or procure her to submit to the use and employment of any instrument or other means whatever, with intent thereby to produce the miscarriage of any such woman, unless, etc., shall, in case the death of such woman or of such child be thereby produced, be deemed guilty of a felony, etc., and that as the third count charges the use of these prohibited means to perpetrate the crime, the miscarriage of the woman; and in consequence of some one or all, that the death of the child and woman were effected, and charging all as constituting a single felony, there is no duplicity. The law sanctions this mode of pleading in criminal cases. *The People v. Davis*, 39.

2. The defendant was convicted of grand larceny, after a former conviction for the same crime.

Held, that the former conviction and discharge must be alleged in the indictment, and must be proved on the trial and passed upon by the jury. A more severe penalty is denounced by the statute for a second offence; and all the facts to bring the case within the statute must be established on the trial. The objection that such evidence may affect the prisoner's character has no force when such evidence relates to the issue to be tried.

Held, that, as there was no evidence that the prisoner had been discharged or pardoned, as the statute requires, except by the fact that sufficient time had elapsed to enable the prisoner to serve out his sentence, if the point had been raised in the court below, and decided adversely, following *Wood v. The People*, 1 Cowen's Crim. Rep., 554, the point would have been available. *Johnson v. The People*, 48.

3. *Held*, that, although the indictment appears upon its face to have been presented by the oaths of *twenty-four* grand jurymen, notwithstanding the statute provides "there shall not be more than *twenty-three*, nor less than sixteen persons sworn on any grand jury," yet as *all* of the grand jury concurred in the finding the defendants suffered no injustice even if one more jurymen was added to the statutory number; beside, as the defendants did not make the objection at the Oyer, it is too late to set up the objection after conviction and sentence. The error complained of does not amount to making a nullity of the indictment; it, at most, is an irregularity, not capable now of avoiding the conviction. *Conkey v. The People*, 58.

4. The counsel for the prisoners objected to the complaint on the ground that it did not specifically charge the prisoners with being the keepers of the disorderly house on the 24th day of May, 1874.

Held, that the rule is well settled, that the indictment will be good if the day and year can be collected from the whole statement, though they be not expressly averred. In this case the day and year is clearly gathered from the entire complaint and verification. *Gill v. The People*, 93.

5. The prisoner was a policeman, and, while in a state of intoxication, assaulted the prosecutor without cause and beat him with his club. At the close of the trial the prisoner requested the court to charge that the prisoner could not be convicted, under the indictment, for an assault with a sharp dangerous weapon,

with intent to do bodily harm, and this was conceded by the district attorney. The court made no ruling upon it.

Held, that it was erroneous as a legal question, but the error is not available because : 1st. It was the request of the prisoner's counsel. 2d. The court made no ruling upon it. 3d. There was no exception.

The counsel for the prisoner requested the court to charge the jury that, before they could convict the prisoner of an assault with intent to kill, they must be satisfied upon the evidence that, had death ensued, the prisoner would be guilty of murder in the second degree. This request was refused, and exception taken.

Held, that as the crime charged was an assault with intent to kill, and that in his charge the judge distinctly told the jury that it was indispensable to a conviction of the principal offence to find that the prisoner intended to kill the prosecutor, and gave the jury detailed instructions as to the rules of evidence applicable to the offence, and as there was no exception to any part of the charge, it must be assumed that the jury found the necessary intent, consequently there was no error.

Held, also, that when the instructions of the court are unexceptionable as to the offence charged and for which the prisoner is on trial, and such instructions cover every element of the crime, and correct rules for the proper application of the evidence, it is not strictly the right of a prisoner to ask instructions upon a hypothetical case, based upon other facts, but all that the prisoner can legally ask is, that the court shall correctly charge the jury as to the crime for which he is being tried.

The prisoner's counsel requested the court to instruct the jury, that, in order to convict, they must specifically find that the prisoner would have been guilty of murder in the second degree, if death had ensued. This request was refused.

Held, no error. This request excluded the hypothesis of murder in the first degree, and implied that in such an event the prisoner could not have been convicted. *Slattery v. The People*, 99.

6. The assignments of perjury in the indictment were founded upon the evidence of the prisoner Wood, on the trial of an action of slander. The court was requested to charge the jury that it had not been proved that the testimony, upon which the perjury had been assigned, was material to the issue tried. The same request was made, separately, in respect to each particular statement of the prisoner, upon which perjury was assigned. These requests were refused, and exceptions taken. The jury rendered a general verdict of guilty.

Held, that it must appear, either from the facts set forth in an indictment for perjury that the matter sworn to and upon which the perjury is assigned was material, or it must be expressly averred, that it was material, and the materiality must be proved on the trial or there can be no conviction. *Wood v. The People*, 116.

7. The prisoner was indicted and convicted of arson in the first degree, in setting fire to certain dwelling-houses in the village of Canastota, to the number of thirty-five. On the trial the people elected to proceed as to one house only, and that was the house of Mary H. Parker.

Held, that it was proper to indict the prisoner as for one offence, and, provided the destruction of every house amounted to the same degree of arson, the

indictment need contain but one count. Regarding the entire fire as one transaction, the burning, condition, situation and occupancy of the several houses, were simply matters of detail.

A motion by the prisoner's counsel was made to quash the indictment, and in arrest of judgment, on the ground that the indictment did not state there was some human being in each dwelling-house at the time the houses were fired or burned.

Held, that the first degree of arson requires the presence of some human being in the dwelling-house at the time the prisoner sets fire to or burns it. The statute describes the crime to be, "willfully setting fire to, or burning, in the night time, a dwelling-house in which there shall be, at the time, some human being." *Held*, further, that a fair construction of the words employed in the indictment, charge the presence of a human being in each of the houses, at the time they were burned. *Woodford v. The People*, 123.

8. The prisoner was convicted upon the third count of the indictment which charged him with committing an assault and battery with intent to kill by such means or force as was likely to produce death. It is claimed that the conviction cannot be sustained, because that count contains no averment that the assault was "with a deadly weapon."

Held, that the statute upon which the third count of the indictment is drawn, is by no means limited to assaults and batteries with intent to kill, by means of any "deadly weapon," that is only one of the alternatives of the provision; the other is an assault and battery, with like intent, by such means and force as was likely to produce death. The latter offence is accurately and particularly set forth in the count. *Lenahan v. The People*, 134

9. The accused was indicted for forgery. Upon his arraignment he demurred to the whole of the indictment, and to each and every count therein.

Judgment was given for the people upon the demurrer.

The indictment contained five counts, and was for forgery in the third degree, in forging and counterfeiting an instrument in writing, purporting to be an account of one Samuel Johnson for alleged services as constable against the county of Saratoga, together with the affidavit and jurat thereto attached, including the certificate of the justice.

The first objection was that the indictment did not contain a criminal offence; inasmuch as the crime of forgery could not be predicated upon the instrument set forth in the indictment.

Held, that the statute provides, that "every person who, with intent to injure or defraud, shall falsely make, alter, forge, or counterfeit * * * any instrument or writing, being, or purporting to be, the act of another, by which any pecuniary demand or obligation shall be, or shall purport to be, created, increased, discharged or diminished * * * by which false making, forging, altering, or counterfeiting, any person may be affected, bound, or in any way injured in his person or property, upon conviction thereof, shall be adjudged guilty of forgery in the third degree;" and that it "shall be sufficient, if such intent appear to defraud * * * any county, city, town or village * * * or any person whatever." These provisions are sufficiently comprehensive to include the instrument in question. It is a writing purporting to be the act of

another, by which a pecuniary demand is purported to be created, and by which another might have been affected, and it is alleged that it was falsely made, forged and counterfeited by the defendant with intent to defraud the county of Saratoga. If the instrument was complete in itself, and sufficient on its face to have induced an acceptance and allowance of the account by the Board of Supervisors, so that it might have produced injustice if the fraud had not been detected, it was the subject of forgery under the statute. It is clearly within the letter and spirit of the statute, and would have been sufficient as the foundation of an indictment at common law.

It is objected that each count separately, is bad for duplicity.

Held, that there is no force in the objection. The account and the signatures to the affidavit and jurat, were all essential to the completion of the instrument before it could be properly presented to the Board of supervisors; and all of them, therefore, constituted but one instrument. *Rosekrans v. The People*, 195.

10. The accused was convicted of perjury, in the Court of General Sessions of New York, and sentenced to ten years imprisonment in the State prison. The perjury alleged in the indictment was committed before George H. Sheldon, fire marshal of the city of New York. The accused swore, on his examination before said marshal that, at the time of the fire, he was not in the city of New York, but was in the city of Troy. The accused also swore, on this examination, that at the time of the fire, there was in the building in which the fire occurred, a stock belonging to him and his copartner, consisting of 65,000 cigars, 185,000 cigarettes, 400 pounds of Havana tobacco, of the value of one dollar and fifty cents per pound, 645 pounds of Virginia tobacco, of the value of sixty-five cents per pound; and that he and his partner sustained a loss by the fire, of between five and six thousand dollars.

The indictment contained two counts. The first, alleging perjury in the prisoner's testimony before the fire marshal, the second, alleging perjury in swearing to an affidavit before the same officer, containing in substance the same allegations.

The accused was convicted upon the second count.

It was objected to on the trial that the law authorizing the fire marshal to administer oaths had been repealed, therefore no testimony in support of the allegations in the indictment should be received.

Held, that the objection was not tenable. The act of 1868, created the office of fire marshal, gave him power, in certain cases, to administer oaths, and enacted that false swearing before him, should be deemed perjury, and punishable as such. The acts of 1870, and 1871, and the city charter of 1873, did not take from the fire marshal the power conferred upon him by the act of 1868. It is very clear, therefore, that, for any false swearing as to any matter legitimately within the sphere of the marshal's powers, an indictment may be had, and a conviction secured on competent evidence.

Held, that when the oath is set out "in substance and to the effect following" a literal copy is not required. It is not necessary to set forth the affidavit, etc., on which perjury is assigned verbatim. *Harris v. The People*, 224.

11. The accused was tried and convicted of the crime of mayhem, at a court of Oyer and Terminer of the county of Kings.

The indictment charged the accused, in substance, with wilfully and feloniously and with premeditated design making an assault upon one Walter Westlake and did then and there wilfully and feloniously and from premeditated design, with his teeth, did cut, bite, slit, and destroy on purpose, with intent, then and there and thereby, in manner aforesaid, the thumb of the said Walter Westlake, then and there to maim and disfigure, against the form of the statute, &c.

On the trial it was shown, that the accused and Westlake were riding in the same street car in the city of Brooklyn ; the accused not paying his fare was put off by the conductor ; that he soon got on again and forced his way into the car, saying, " Let me in till I eat somebody." After he got in he caught hold of the conductor and bit his thumb. Westlake told him to be quiet as there were ladies in the car ; he then sat down. Not long after the accused jumped up, struck Westlake, and seized his nose with his teeth. Westlake put up his hand to protect his face when the accused took hold of Westlake's thumb with his teeth and began chewing it, and continued to chew it until he reached the platform of the car and was forced off by the other passengers. The thumb of Westlake was permanently disabled.

At the close of the evidence the counsel for the defendant requested the court to charge the jury :

First. " Under the indictment in this case, the defendant cannot be convicted of mayhem, in cutting off or disabling the thumb of the complainant.

Second. " The indictment does not allege that the thumb was cut off or disabled.

Third. " The allegation in the indictment that the thumb was destroyed, is disproved by the evidence, the thumb still being perfect on the hand of the complainant, whether disabled or not.

Fourth. " There is no evidence, in the case, of premeditated intent, such as is called for by the statute defining the crime of mayhem.

Fifth. " The premeditated attempt required by the statute, must be evinced by lying in wait or some similar means, and no such evidence has been offered in the case.

Sixth. " The indictment in this case is not sufficient as an indictment for mayhem, and is only good as an indictment for assault and battery."

The court declined so to charge, but did charge, that as to the first three propositions, the word "destroy," as used in the indictment, necessarily included the word "disabled," and that proof that the thumb was disabled answered the averment, and was sufficient to sustain the indictment. The counsel for the prisoner duly excepted.

Held, that the offence is complete whenever a person having formed a design to maim another, proceeds to and does execute it. The jury must find as a fact, before there can be a conviction, that there was a premeditated design to maim, and it must be averred in the indictment.

Held, that the manner in which this design was evinced, and the circumstances establishing it are matters of evidence to be proved on the trial ; the issue being, whether the particular injury was deliberately and intentionally committed.

Held, that the English statute made the maiming of another an offence only when there was premeditation evinced in a particular manner, viz., "by lying in wait." The intention of our statute was to enlarge the definition of the offence, and to include within it all cases of designed and premeditated maiming, and the words "or in any other manner," were inserted for that purpose.

See *Godfrey v. The People*, ante, 209.

Held, that it is a well settled rule of criminal pleading that an indictment upon a statute, must state all the facts and circumstances which constitute the statutory offence, but it is not necessary that the words of the statute should be precisely followed. Words of equivalent import may be substituted, or words of more extensive signification, and which necessarily include the words used in the statute. The word "destroy" used in the indictment is more comprehensive than the word "disable," and it includes what is signified by it, and the indictment is not defective by reason of the substitution.

Held, that it was proper to leave the question to the jury whether the prisoner, by premeditated design, inflicted the injury complained of. The design must precede the conflict, and not originate with or grow out of it. But it is a question of fact for the jury. *Tully v. The People*, 253.

12. The Court of General Sessions of New York city and county, with a jury, convicted the accused of the crime of mayhem, and he was sentenced by the Recorder to imprisonment in the State prison, for the term of fifteen years.

The indictment charged, that the accused did feloniously bite off a piece of the left ear, and disable a member of one James McLaughlin, and that he did feloniously and on purpose maim him, against the form of the statute.

On the trial the prosecution asked a witness, under objection, "Do you remember what McLaughlin said about Burke's coming into the store?" The answer was, "Yes, sir; he told me, when I wanted him to go and sit down and go to sleep, that he was afraid Burke would come in and beat him. I said 'nobody will beat you; sit down and go and take a sleep.'" A motion was made to strike out this answer, and it was denied.

Held, that the statement of the complainant before the occurrence, when the prisoner was not present, was not admissible. In the exercise of a sound discretion, the testimony should have been stricken out. It was entirely incompetent.

The court was asked to charge the jury that the fact of lying in wait was not made out by the prosecution. The court declined, and an exception was taken.

Held, that the prosecution did not make out the fact of lying in wait, contemplated by the statute. The jury could not assume that he was, when the evidence did not warrant it; and the absence of proof of a material fact like that, was a feature in the prosecution to which the prisoner was clearly entitled.

The court was also requested to charge the jury that the offence committed was not mayhem, as contemplated by the statute. The court declined so to charge, and the prisoner's counsel excepted. The court did charge, that it was a question for the jury to say whether his ear was bit off by this man, and whether there was any disability to the ear from this partial destruction. If they shall so decide, I shall instruct them to convict this man of the charge. There was an exception to this.

Held, that, under the evidence, the Recorder was in error. There was no evidence that the ear was disabled. The physician did not so state. Its perfection was destroyed, but its usefulness was not affected. The disability was not for the speculation or conjecture of the jury, but to be considered and disposed of on the evidence. *Burke v. The People*, 258.

13. The Court of Sessions for the county of Erie, and a jury, tried and convicted the accused of perjury. On the trial a motion was made to quash the indictment on the ground that it did not state all the facts necessary to make the defendant guilty of the offence charged, and, that it did not show the defendant guilty of any offence punishable by law. The motion was denied.

Held, that the denial of the motion was error. The gist of the offence charged was, that the defendant wilfully and corruptly swore falsely, in an affidavit made by him for the purpose of obtaining an audit of an unliquidated claim which he had against the city of Buffalo, by the common council of that city, pursuant to section 7 of title 3 of the charter thereof. It is not averred in the indictment, that the affidavit was authorized by the charter; nor that it was made for the purpose required by section 7 of title 3; nor that the claim to which it was appended was ever presented to the common council for audit. Without these averments, sustained by proof, the offence would not be made out. The rule is, that if the indictment does not set forth the facts requisite to constitute the offence charged, a conviction upon it cannot be sustained. *Ortner v. The People*, 268.

14. The prisoner was tried in the Court of Oyer and Terminer of the city and county of New York, and convicted of the crime of murder in the first degree.

There were four counts in the indictment. The first count alleged that the prisoner committed burglary of the store of one James H. Noe with the intent to steal. That during the commission of the burglary he struck said Noe upon the head with a bar of iron, wounding him and of which he died and in that manner committed murder. The second count alleged that the killing was done while the prisoner was committing robbery from the person of the said Noe. The third count alleged that the killing was with the deliberate and premeditated design to effect the death of said deceased. The fourth was the common law count for murder.

Held, that there was but one offence charged in the first count, and that was murder while engaged in the commission of the felony described.

Held, that the first count describes a complete burglary and then alleges that the accused committed the murder while engaged in the burglary, not after he had committed it. The offence of burglary is complete when the burglar breaks into a dwelling-house, with the intent to steal, but he may be said to be engaged in the commission of the crime until he leaves the building with his plunder; and if while securing his plunder, he kills any one resisting him, he is guilty of murder under the statute.

Held, that this count is not defective, in that the allegation was that the killing was "wilful and felonious." It is the law that an indictment upon a statute must state all the facts and circumstances which constitute the statute offence, so as to bring the accused perfectly within the provisions of the statute, but it need not contain the words of the statute. It is generally sufficient if it contain the substance and effect of them. The offence is fully described by

alleging that the defendant, wilfully and feloniously, killed Noe while he was engaged in the commission of the felony of burglary. *Dolan v. The People*, 287.

15. The accused was indicted, tried and convicted for the crime of seduction under promise of marriage. There were five counts in the indictment charging the same offence, and the counsel for the accused moved the court to require the district attorney to elect upon which count he would rely for a conviction. The motion was denied and exception taken.

Held, that the motion was properly denied. The indictment in each of its counts alleged but one and the same offence, with such variations of allegations as were prudentially fitted to meet variations in the proof. *Armstrong v. The People*, 317.

16. The accused was tried for burglary in the first degree, in the Court of Sessions of Richmond county, and he was convicted. The Supreme Court of the second judicial district confirmed the judgment and the accused brought error.

The indictment alleged that the accused broke and entered, in the night time, "the dwelling-house of Frederick Kohnsen and John F. Lubkin, being copartners in business under the firm name and style of Kohnsen & Lubkin." The crime as defined by the Revised Statutes consists, in breaking into, and entering in the night time, in the manner there specified, the dwelling-house of another, in which there is at the time some human being, with the intent to commit some crime therein. The evidence showed the breaking and entering, and the criminal intent.

Held, that the questions to be decided are, first, whether it is legally proper, in an indictment for burglary of a dwelling-house, to aver the ownership in a partnership and, second, whether the proof showed that the room entered was a dwelling-house within the intent of the statute.

Held, as to the first point, that according to numerous and clear authorities, the ownership of the dwelling-house may be laid in the indictment to be in the members of a copartnership, where the facts of the case warrant it.

Held, as to the second point, that the definition of the crime of burglary given by the statute, does not differ from the definition of the crime of burglary at common law, and at common law it has been held that it was not needful that there should be an internal communication between the room or building in which the owner dwelt, if the two rooms or building were in the same inclosure, and were built close to and adjoining each other. Where the room or building entered, was under the same roof with the building or room occupied for sleeping in, it is part of the dwelling-house within the statutory or common law definition of burglary.

Held, that where different stores in a large building, some parts of which are used for sleeping apartments, and are rented to different persons for purposes of trade or commerce, or mechanical pursuit, or manufacturing, another rule comes in. That rule is, that a part of a dwelling-house may be so severed from the rest of it, by being let to a tenant, as to be no longer a place in which burglary in the first degree can be committed, if there be no internal communication, and the tenant does not sleep in it. Then it is not parcel of the dwelling-house of the owner, for he has no occupation or possession of it; nor is it a dwelling-house of the tenant, for he does not lodge there. *Quinn v. The People*, 331.

17. The indictment was in the usual form. It contained the averment in the first count, that the sale was made in the ninth ward of the city of New York, to be drank in the house, store, shop and place of the seller.

Held, that such averment was all that was required in this respect to bring the case within the restraint imposed by the statute. It fully apprised the accused of the nature of the crime charged, and of the time and place where it would be claimed by the prosecution the offence had been committed by him. *Schwab v. The People*, 354.

18. The accused was indicted for embezzling, at different times, money belonging to the money-order office in the city of New York, he being a clerk therein at the times when the alleged crimes were committed. The indictment was based upon the eleventh section of the "Act to establish a postal money-order system," passed May 17, 1864.

The indictment was found on the 21st of February, 1874, and the accused pleaded, "that the several offences did not arise, exist, or accrue, within two years next before the finding of said indictment." To this plea the United States demurred. Upon the sufficiency of this plea the judges were divided in opinion, and such division of opinion between the judges of the Circuit Court of the United States for the Southern District of New York, was certified.

The "Act for the punishment of certain crimes against the United States," passed 30th of April, 1790, declares, "Nor shall any person be prosecuted, tried or punished for any offence not capital, nor for any fine or forfeiture under any penal statute, unless the indictment or information for the same shall be found or instituted within two years from the time of committing the offence or incurring the fine or forfeiture aforesaid." The act of the 26th of March, 1804, in addition enacts, "that any person guilty of crimes arising under the revenue laws of the United States, or incurring any fine or forfeiture by breaches of said laws, may be prosecuted, tried and punished, provided the indictment or information be found at any time within five years after committing the offence or incurring the fine or forfeiture, any law or provision to the contrary notwithstanding."

Held, that the substantial question presented is, which of these two provisions applies to a bar to a prosecution for the offences described in the indictment in connection with the further question, whether the "Act to establish a postal money-order system" is a revenue law within the meaning of the third section of the act of 1804.

Held, further, that the offences charged in the indictment, were crimes arising under the money-order act, and, that neither the title or the sections of that act indicate that Congress, in enacting it, had any purpose of revenue in view. Its object, as expressly declared at the outset of the first section, was "to promote public convenience, and to insure greater security in the transmission of money through the United States mails," and, therefore, defendant cannot be prosecuted, tried, or punished, unless the indictment shall have been found within two years from the time of the committing the offences; and that the indictment is not for crimes arising under the revenue laws, within the intent and meaning of the third section of the act approved March 26, 1804. *United States v. Norton*, 358.

19. *Held*, that the conviction was obtained under the act of 1854, as the indictment alleges that the instrument used was "sharp, dangerous," that the assault

was made with intent "to do bodily harm," and that it was "without justifiable or excusable cause." These allegations were all necessary under the act of 1854 but not under the act of 1866. Whether the instrument used in the commission of the crime was sharp or not was matter of proof, as alleged upon the trial. It is sufficient, to uphold the indictment, that at least one of the instruments mentioned in the statute and alleged in the indictment was commonly known as sharp. The jury were correctly charged that they could not convict the prisoner unless they found the instrument used was sharp and dangerous.

The court refused to charge that "if the jury can satisfactorily account for the wound on O'Brien's head in any other manner than by an assault by the prisoner with such a weapon as is named in the indictment, it is their duty to acquit the prisoner," but did charge that they might or might not convict him of simple assault and battery.

Held, that in this there was no error. In an indictment for assault and battery it is not necessary to specify any instrument with which the crime was committed; and if the instrument be specified it is mere surplusage which may be disregarded, and need not be proved upon the trial. Hence, the prisoner could have been convicted of a simple assault and battery, even if the jury had found that he did not use either of the instruments specified in the indictment. *The People v. Casey*, 371.

20. The accused was convicted by the Court of Oyer and Terminer held in Albany county, of the crime of forgery in the third degree. The General Term of the Third Department affirmed the judgment entered upon such verdict of conviction.

The accused was a clerk of the Treasurer of the State of New York and his duties were to receive moneys and securities belonging to the State, which came to the hands of the Treasurer, and to deposit them in bank; to keep the accounts between the State and the deposit banks, and other banks. The charge was in having made a false entry in a book of accounts kept in the office of the State Treasurer, whereby, in an account in such book between the Treasurer and the Mechanics and Farmers' Bank of Albany, the latter was debited with a deposit or transfer of the sum of \$200,000. The false entry in question was made on the 31st of August, 1873.

The accused was indicted under section thirty-four of 2 Revised Statutes, 673, which provides, that "every person who, *with intent to defraud*, shall make any false entry, or shall falsely alter any entry made, in any book of accounts kept in the office of the Comptroller of this State, or in the office of the Treasurer, or of the Surveyor-General, or of any county treasurer, by which any demand or obligation, claim, right or interest, either against or in favor of the people of this State, or any county or town, or any individual, shall be, or shall purport to be, discharged, diminished, increased, created, or in any manner affected, shall, upon conviction, be adjudged guilty of forgery in the third degree."

The indictment, in some of the counts, charged the alleged false entry to have been made, with the intent to defraud the Mechanics and Farmers' Bank of Albany, and in others, with intent to defraud the people of the State of New York.

It is claimed by the counsel for the accused, that the entry was made for the sole purpose of concealing his previous defalcations, and if made for that pur-

pose he could not be convicted of the crime of forgery ; and that the false entry could not operate to defraud either the State or the bank, and could have no legal tendency to affect any fund, or affect the property, rights, or interests of any one, as the accused never realized, nor could he realize, any sum whatever by making the entry, nor could the State or the bank be losers thereby to any amount.

Held, that this construction of the statute cannot be maintained. The statute requires that the false entry be made with intent to defraud, but it is not necessary that the intent be to obtain money, or cause the loss of money directly by means of the false entry. The words "with intent to defraud" are used as synonymous with the words "with fraudulent intent," or "for a fraudulent purpose," to distinguish the case from one of an erroneous entry, made through mistake or under a misapprehension of a right, or such fictitious entries as are sometimes made for book-keeping purposes, or otherwise innocently. Where the false entry was part of a criminal scheme to conceal or temporarily cover up the defalcation of the accused, there was a fraudulent intent sufficient to satisfy the statute. The entry was made on the 31st of August, 1873, covering up previous offences and enabling the accused to continue in his position until the next October. The jury had a right to infer from the evidence that the entry was made with intent to enable the accused to retain the fruits of his depredations, or to continue them, and that he had continued them during this interval. The law would attach to the concealment, the intent to accomplish the result to which it naturally tended.

Objection was made, that the false entry was not set out in words and figures.

Held, that the counts are good, being set out in the words of the statute, but as some of the counts did set out a copy of the entry, and as the verdict was a general one, and there being evidence in support of these last counts, it is sufficient to sustain the conviction.

It was objected to on the part of the accused, that there was a variance between the account set forth in the indictment and as proved upon the trial in regard to the entry of \$125,000.

Held, that such entry was nearly six months previous to the date of the false entry, and as it was wholly immaterial, it could not have misled or prejudiced the prisoner. *Phelps v. The People*, 376.

21. The defendant was indicted for the crime of grand larceny and convicted in the Court of Oyer and Terminer held in the county of Albany.

There were two indictments tried by the same court, and two convictions had. One was for stealing a draft for \$7,500, the other for stealing a draft for \$400. The General Term of the Supreme Court, in the third judicial department affirmed both judgments, and error is brought to review them. The prisoner was sentenced to the Albany Penitentiary.

It is claimed that the draft, the subject of the larceny, was not properly described in the indictment, inasmuch as there was no averment in the indictment, that there was any money due upon or secured by the draft, or remaining unsatisfied upon it, or that might in any contingency be collected thereon.

Held, that to steal such an instrument was not larceny at common law, but it is made so by statute. The definition or description of the offence is contained in the statute, and if the indictment avers the offence, as the statute defines it,

the averment is sufficient. The rule is, that, while in framing an indictment on a statute, all the circumstances which constitute the definition of the offence in the statute itself, so as to bring the accused precisely within it, must be stated; yet no other description of the thing is necessary to be stated, than that contained in the statute itself, unless the value becomes necessary to fix the grade of the offence. It must be laid in the words of the act creating the offence, or at least in words plainly equivalent. The indictment in this case avers, 1st. The kind of property. 2d. The other of whom it is the property; and, 3d. The value of the property, as over twenty-five dollars. And thus is made a complete averment of all the constituents of the statutory crime of which the prisoner was found guilty.

It is further claimed, that to constitute a good indictment for larceny, it is necessary that the name of the true owner of the thing stolen, if known, should be stated, and that those named in the indictment, to wit, the State of New York, Thomas Raines, Nelson K. Hopkins, Raines as State Treasurer, nor Hopkins as Comptroller, had any general or special property in the draft, and that it was manifestly improper to aver it to be the property of a person or persons unknown.

Held, that it was of no avail in this case to allege that the draft was the property of a person or persons to the jurors unknown. The grand jury had all the information of ownership which was needed to determine in whom was the ownership.

It is not necessary that the indictment should name that person as owner, and him only, who was the general ownership of the property, a title absolute, which he can maintain against the whole world. It is enough, if any one be named who has a special property in the thing stolen. A special property is a qualified or limited right, such as a bailee of it has, and the special interest acquired by the public agents of the State was the interest of the State, and hence the State obtains and retains the special interest in the property which will sustain an averment of ownership.

The next question to be decided is, whether there was an actual or constructive possession of the draft in the alleged owner, the State of New York, at the time of the taking.

Held, that when property is received by the servant or custodian from another, who occupies the relation of agent for the owner, or who stands in the position of the owner in respect to the possession; then, though the owner never had the actual possession, yet the possession of such other person is his possession. In this case the draft came into the State hall, and went first to the actual possession of Mr. Gallien, the second Deputy Comptroller. Thus it came into the actual possession of a sub-servant of the State, whose actual possession was the possession of the State, who thereby became the special owner of it. It was sent to the accused by a special messenger, a sub-servant of the State who had actual possession of the draft, thus the actual possession of the messenger was the possession of the State, and the delivery of the draft into the custody of the accused for a special purpose, was a delivery by the State to him for that purpose. Thus, he had only the custody or charge of the draft, and if the taking of it by him from the messenger was not a trespass, the carrying it away, having only the bare custody of it, was, and if that carrying of it away was with felonious intent, as the jury have found that it was, it was larceny, for, when the owner has parted with the custody only of the property, and not with

the possession, and the servant converts the chattel to his own use, it is larceny, though he had no felonious intent when he received it into his custody.

Held, that the draft was a legal, operative instrument when it reached the hands of the accused; it had been by the original payee indorsed to Mr. Hopkins, as Comptroller.

Held, that the testimony of the conversation with the accused at Jersey City, was properly received. Though it did not particularize this draft, it did show circumstances which might, by inference, include or refer to this.

Held, that the challenge to the juror Lamb was properly overruled. Though some of his answers, taken separately would perhaps have established a disqualification, yet the effect of all that he said was to show him a proper juror, under the late statutes.

Held, that the accused was legally indicted and convicted, and is justly undergoing the punishment for his unlawful act. *Phelps v. The People*, 383.

22. The defendants were tried in the Circuit Court of the United States for the District of Louisiana, on an indictment for conspiracy under the sixth section of the act of May 30, 1870, known as the Enforcement act. The indictment contained thirty-two counts and three of the defendants were found guilty under the first sixteen counts, and not guilty under the remaining counts. The general charge in the first eight counts is that of "banding," and in the second eight, that of "conspiring" together to injure, oppress, threaten, and intimidate Levi Nelson and Alexander Tillman, citizens of the United States, of African descent and persons of color, with the intent thereby to hinder and prevent them in their free exercise and enjoyment of rights and privileges "granted and secured" to them "in common with all other good citizens of the United States by the constitution and laws of the United States."

The parties convicted moved in arrest of judgment on the following grounds:

1. Because the matters and things set forth and charged in the several counts, one to sixteen inclusive, do not constitute offences against the laws of the United States, and do not come within the purview, true intent, and meaning of the act of Congress, approved 31st of May, 1870, entitled "*An Act to enforce the rights of citizens of the United States*," &c.

2. Because, &c. &c., do not constitute offences cognizable in the Circuit Court, and do not come within its powers and jurisdiction.

3. Because the offences created by the sixth section of the act of Congress referred to, and upon which section the aforesaid sixteen counts are based, are not constitutionally within the jurisdiction of the courts of the United States, and because the matters and things therein referred to are judicially cognizable by State tribunals only, and legislative action thereon is among the constitutionally reserved rights of the several States.

4. Because the said act, in so far as it creates offences and impose penalties, is in violation of the Constitution of the United States, and an infringement of the rights of the several States and the people.

5. Because the eighth and sixteenth counts of the indictment are too vague, general, insufficient, and uncertain, to afford the accused proper notice to plead and prepare their defence, and set forth no specific offence under the law.

6. Because the verdict of the jury against the defendants is not warranted or supported by law.

On this motion the opinion of the judges were divided, and at the instance of the United States the case comes up on the certificate of this division of opinion. The certificate states the question to be, whether "the said sixteen counts of said indictment are severally good and sufficient in law, and contain charges of criminal matter indictable under the laws of the United States."

This certificate presents the question whether this indictment, based upon section 6 of the Enforcement Act of May 31, 1870, is sufficient in law and contains charges of criminal matter indictable under the laws of the United States.

Section six reads as follows:—"That if two or more persons shall band or conspire together, or go in disguise upon the public highway, or upon the premises of another, with an intent to violate any provision of this act, or to injure, oppress, threaten, or intimidate any citizen, with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the constitution or laws of the United States, or because of his having exercised the same, such persons shall be held guilty of felony, and, on conviction thereof, shall be fined or imprisoned, or both, at the discretion of the court,—the fine not to exceed \$5,000, and the imprisonment not to exceed ten years; and shall, moreover, be thereafter ineligible to, and disabled from holding, any office or place of honor, profit, or trust created by the constitution or laws of the United States." 16 Stat. 141.

Held, that the general charge in the first eight counts is that of "banding," and in the second eight, that of "conspiring" together to injure, oppress, threaten, and intimidate Levi Nelson and Alexander Tillman, citizens of the United States, of African descent and persons of color, with the intent thereby to hinder and prevent them in their free exercise and enjoyment of rights and privileges "granted and secured" to them "in common with all other good citizens of the United States by the constitution and laws of the United States."

Held, that the offences provided for by the statute in question do not consist in the mere "banding" or "conspiring" of two or more persons together, but in their banding or conspiring with the intent, or for any of the purposes specified. To bring this case under the operation of the statute, therefore, it must appear that the right, the enjoyment of which the conspirators intended to hinder or prevent, was one granted or secured by the constitution or laws of the United States. If it does not so appear, the criminal matter charged has not been made indictable by any act of Congress.

Held, that the government of the United States is one of delegated powers alone. Its authority is defined and limited by the Constitution. All powers not granted to it by that instrument are reserved to the States or the people. No rights can be acquired under the constitution or laws of the United States, except such as the government of the United States has the authority to grant or secure. All that cannot be so granted or secured are left under the protection of the States.

Held, that the first and ninth counts of the indictment state the intent of the defendants to have been to hinder and prevent the citizens named, in the free exercise and enjoyment of their "lawful right and privilege to peaceably assemble with each other and with other citizens of the United States for a peaceful and lawful purpose." The right of the people peaceably to assemble for lawful pur-

poses existed long before the adoption of the Constitution of the United States. In fact, it is, and always has been, one of the attributes of citizenship under a free government. It "derives its source from those laws whose authority is acknowledged by civilized man throughout the world." It is found wherever civilization exists. It is not, therefore, a right granted to the people by the Constitution. The government of the United States when established found it in existence, with the obligation on the part of the States to afford it protection. As no direct power over it was granted to Congress, it remains subject to State jurisdiction.

Held, that the particular amendment of the Constitution now under consideration assumes the existence of the right of the people to assemble for lawful purposes, and protects it against encroachment by Congress. The right was not created by the amendment; neither was its continuance guaranteed, except as against congressional interference. For their protection in its enjoyment, therefore, the people must look to the States. The power for that purpose was originally placed there, and it has never been surrendered to the United States.

Held, that if it had been alleged in these counts, that the object of the defendants was to prevent a meeting for such a purpose, the case would have been within the statute, and within the scope of the sovereignty of the United States. Such, however, is not the case. The offence, as stated in the indictment, will be made out, if it be shown that the object of the conspiracy was to prevent a meeting for any lawful purpose whatever.

Held, that the second and tenth counts are equally defective. The right there specified is that of "bearing arms for a lawful purpose." This is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The second amendment declares that it shall not be infringed; but this, as has been seen, means no more than that it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the national government, leaving the people to look for their protection against any violation by their fellow citizens of the rights it recognizes, to what is called the "powers which relate to merely municipal legislation, or what was, perhaps, more properly called, internal police," "not surrendered or restrained" by the Constitution of the United States.

Held, that the third and eleventh counts are even more objectionable. They charge the intent to have been to deprive the citizens named, they being in Louisiana, "of their respective several lives and liberty of person without due process of law." This is nothing else than alleging a conspiracy to falsely imprison or murder citizens of the United States, being within the territorial jurisdiction of the State of Louisiana. The rights of life and personal liberty are natural rights of man. "To secure these rights," says the Declaration of Independence, "governments are instituted among men, deriving their just powers from the consent of the governed." The very highest duty of the States, when they entered into the Union under the Constitution, was to protect all persons within their boundaries in the enjoyment of these "unalienable rights with which they were endowed by their Creator." Sovereignty, for this purpose, rests alone with the States. It is no more the duty or within the power of the United States to punish for a conspiracy to falsely imprison or murder within a State, than it would be to punish for false imprisonment or murder itself. The fourteenth amendment prohibits a State from depriving

any person of life, liberty, or property, without due process of law; but this adds nothing to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the States upon the fundamental rights which belong to every citizen as a member of society. It secures "the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice." These counts in the indictment do not call for the exercise of any of the powers conferred by this provision in the amendment.

Held, that the fourth and twelfth counts charge the intent to have been to prevent and hinder the citizens named, who were of African descent and persons of color, in "the free exercise and enjoyment of their several right and privilege to the full and equal benefit of all laws and proceedings, then and there, before that time, enacted or ordained by the said State of Louisiana and by the United States; and then and there, at that time, being in force in the said State and District of Louisiana aforesaid, for the security of their respective persons and property, then and there, at that time enjoyed at and within said State and District of Louisiana by white persons, being citizens, of said State of Louisiana and the United States, for the protection of the persons and property of said white citizens." There is no allegation that this was done because of the race or color of the persons conspired against. The case as presented amounts to nothing more than that the defendants conspired to prevent certain citizens of the United States, being within the State of Louisiana, from enjoying the equal protection of the laws of the State and of the United States.

Held, that the fourteenth amendment prohibits a State from denying to any person within its jurisdiction the equal protection of the laws; but this provision does not, any more than the one which precedes it, add anything to the rights which one citizen has under the Constitution against another. The duty of protecting the equality of the rights of citizens was originally assumed by the States; and it still remains there. The only obligation resting upon the United States is to see that the States do not deny the right. This the amendment guarantees, but no more.

Held, that the sixth and fourteenth counts state the intent of the defendants to have been to hinder and prevent the citizens named, being of African descent, and colored, "in the free exercise and enjoyment of their several and respective right and privilege to vote at any election to be thereafter by law had and held by the people in and of the said State of Louisiana, or by the people of and in the parish of Grant aforesaid." Inasmuch, therefore, as it does not appear in these counts that the intent of the defendants was to prevent these parties from exercising their right to vote on their race, &c., it does not appear that it was their intent to interfere with any right granted or secured by the constitution or laws of the United States. One may suspect that race was the cause of the hostility; but it is not so averred. This is material to a description of the substance of the offence, and cannot be supplied by implication. Every thing essential must be charged positively, and not inferentially. The defect here is not in form, but in substance.

Held, that the seventh and fifteenth counts are no better than the sixth and fourteenth. The intent charged is to put the parties named in great fear of bodily harm, and to injure and oppress them, because, being and having been in all things qualified, they had voted "at an election before that time had and held according to law by the people of the said State of Louisiana, in said State,

to wit, on the fourth day of November, A.D. 1872, and at divers other elections by the people of the State, also before that time had and held according to law." There is nothing to show that the elections voted at were any other than State elections, or that the conspiracy was formed on account of the race of the parties against whom the conspirators were to act. The charge as made is really nothing more than a conspiracy to commit a breach of the peace within a State. Certainly it will not be claimed that the United States have the power or are required to do mere police duty in the States. If a State cannot protect itself against domestic violence, the United States may, upon the call of the executive, where the legislature cannot be convened, lend their assistance for that purpose. This is a guaranty of the Constitution ; but it applies to no case like this.

Held, that the first, second, third, fourth, sixth, seventh, ninth, tenth, eleventh, twelfth, fourteenth, and fifteenth counts do not contain charges of a criminal nature made indictable under the laws of the United States, and are not good and sufficient in law. They do not show that it was the intent of the defendants, by their conspiracy, to hinder or prevent the enjoyment of any right granted or secured by the Constitution.

Held, that the intent charged in the fifth and thirteenth is "to hinder and prevent the parties in their respective free exercise and enjoyment of the rights, privileges, immunities, and protection granted and secured to them respectively as citizens of the United States, and as citizens of said State of Louisiana," "for the reason that they, * * * being then and there citizens of said State and of the United States, were persons of African descent and race, and persons of color, and not white citizens thereof ;" and in the eighth and sixteenth, to hinder and prevent them "in their several and respective free exercise and enjoyment of every, each, all, and singular the several rights and privileges granted and secured to them by the constitution and laws of the United States." The same general statement of the rights to be interfered with is found in the fifth and thirteenth counts.

Held, that the question here is whether the offence has here been described at all. These counts in the indictment charge, in substance, that the intent in this case was to hinder and prevent these citizens in the free exercise and enjoyment of "every, each, all, and singular" the rights granted them by the Constitution, &c. There is no specification of any particular right.

Held, that in criminal cases, prosecuted under the laws of the United States, the accused has the constitutional right "to be informed of the nature and cause of the accusation." The indictment must set forth the offence "with clearness and all necessary certainty, to apprise the accused of the crime with which he stands charged, and every ingredient of which the offence is composed, must be accurately and clearly alleged. It is an elementary principle of criminal pleading, that where the definition of an offence, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offence in the same generic terms as in the definition ; but it must state the species,—it must amount to particulars. A crime is made up of acts and intent ; and these must be set forth in the indictment, with reasonable particularity of time, place, and circumstances. The indictment should state the particulars, to inform the court as well as the accused.

Held, that these counts are too vague and general. They lack the certainty

and precision required by the established rules of pleading, and they are not good and sufficient in law. *United States v. Cruikshank*, 400.

23. The accused was tried and convicted at the Rensselaer Court of Sessions for bigamy, in having married in Washington county while the wife of a former marriage was still living, etc. The second marriage was on the 12th of March, 1875, and the indictment was found the 26th of the same month, and it alleged the apprehension of the accused in Rensselaer county on the 23d day of March of that year. After the arrest of the accused on the 23d of March he escaped and was re-arrested in Vermont on the 26th of March, 1875. The objection is taken, that the Rensselaer county courts had no jurisdiction to indict under these facts.

Held, that the statute provides that an indictment may be found "in the county in which such person shall be apprehended." The actual arrest, before indictment found, gives jurisdiction; the escape does not take it away; nor discharge on bail destroy jurisdiction once acquired. If apprehended in the county where the indictment is afterward found, he may be there tried as if the offence had been committed there. The evidence that the defendant was arrested in Rensselaer county, is sufficient to satisfy the statute. *Al King v The People*, 429.

24. The accused was tried in the Court of Sessions of Jefferson county, upon an indictment charging him with selling "strong and spirituous liquors and wines, in quantities less than five gallons at a time," without having a license therefor. There was no allegation in the indictment that the selling was of liquors "to be drank on the premises."

On the trial it was shown that the accused had a storekeeper's license, which authorized him to sell in quantities less than five gallons at a time, but not to be drank on the premises. It was also shown that the accused made sales of liquor, by the glass, to be drank in his store,

The counsel for the accused asked the court to rule: 1st. That the indictment was insufficient, in that it should have been under the fourteenth section of the act of 1857, instead of the thirteenth section. 2d. That the license proved was an absolute protection to the accused for any sales proved.

The court overruled these objections, severally, and the accused excepted.

Held, that the gist of the offence of which the accused was convicted, consisted not of the act of selling, but of the purpose for which the sale was made. He had a license which authorized him to make the sale, but he was prohibited from making any sale of spirituous liquors to be drank on his premises. There is no averment in the indictment that the accused violated that prohibition.

Held, that the selling without a license is a distinct offence from that a person commits when licensed as a storekeeper he sells to be drank on the premises. It is as necessary to aver the illegal purpose of the sale in the latter case, as a want of the license in the former. To make out the offence, it must be proved that the accused not only sold the liquor, but that he sold it to be drank on the premises. Whatever is essential to be proved must be averred.

Held, that the rule of law upon this subject is elementary, and requires that the accused be specially brought within all the material words of the statute, and nothing can be taken by intendment. *Huffstater v. The People*, 436.

25. The defendant was indicted and tried at the Court of Sessions held in the county of Suffolk.

There were two counts in the indictment, one for rape, and the other for an assault with an intent to commit a rape.

The jury brought in a verdict for rape.

The counsel for the prisoner, upon the trial, requested the court to require the district attorney to elect on which count he should proceed, which request was denied.

Held, that the denial of such request was no error. The two counts were drawn solely to meet the different aspects in which the evidence might be viewed by the jury. *The People v. Satterlee*, 438.

26. The Court of Sessions of Niagara county, with a jury, tried the accused upon an indictment which set out his former conviction of the crime of grand larceny, and his sentence to State prison, and then alleged that "having been duly discharged and remitted of such judgment and conviction," afterwards committed petit larceny.

The accused pleaded guilty, and when brought up for judgment, claimed that he was only indicted for petit larceny. This claim was overruled and he was sentenced to State prison for one year and three months.

Held, that the Revised Statutes under which he was indicted, tried, convicted and sentenced provides that, "if any person, convicted of any offence punishable by imprisonment in a State prison, shall be discharged, either upon being pardoned or upon expiration of his sentence, and shall subsequently be convicted of any offence committed after such pardon or discharge, he shall be punished," etc., and where the allegation is, as in this indictment, "having been duly discharged and remitted of such judgment and conviction" the allegation is sufficiently broad and definite to bring the case within the provisions of the statute. The word *duly* means, in a proper way, or according to law. The word *remitted*, as applicable to a crime, means pardoned. The allegation in this indictment would then read, has been duly or according to law discharged and pardoned of such judgment and conviction. Such allegation that he has been according to law discharged and pardoned, substantially meets the statute.

The dicta in *Wood v. The People*, 1 Cowen's Crim. Rep., 554, commented upon.

See foot note, at the end of this case. *Gibson v. The People*, 440.

27. The accused was convicted upon a general plea of guilty to an indictment, and sentenced, by the Court of General Sessions of the city of New York, to imprisonment in the penitentiary of the city of New York for thirty days, and to pay a fine of \$200.

The indictment charged the defendant with exposing for sale in the city of New York, impure and unwholesome milk, adulterated with water, against the form of the statute; with keeping and offering such unwholesome milk for sale in violation of the sanitary code and of the statute, and, with bringing it into the city of New York for sale, in violation of an ordinance of the sanitary code, passed by the board of health of the city, February 23, 1876, of which the publication is alleged, and which is set out in the third count in full.

The General Term of the Supreme Court, in the first judicial district, affirmed the judgment, and the defendant brought error.

The question presented is as to the validity of the sentence.

Held, that by the Laws of 1862, as amended by section 1 of chapter 544 of the Laws of 1864, the knowingly selling or exposing for sale of impure, adulterated or unwholesome milk is made a misdemeanor, punishable by a fine of not less than fifty dollars, and if the fine is not paid, by imprisonment for not less than thirty days in the penitentiary or county jail, or until the fine be paid. Section 4 declares that the addition of water or any substance, other than is sufficient to preserve the milk while in transportation to market, is an adulteration. This is a general statute.

Held, that the board of health of the city of New York, February 23, 1876, enacted the following ordinance, and made it a part of the sanitary code: "No milk which has been watered, adulterated, reduced or changed in any respect by the addition of water or other substance, or by the removal of cream, shall be brought into, held, kept or offered for sale at any place in the city of New York, nor shall any one keep, have, or offer for sale any such milk."

Held, that the authority to pass sanitary ordinances was conferred on the board of health of the city of New York by chapter 335 of the Laws of 1873, which created the board.

Held, that the eighty-second section of that act requires the board to adapt the existing sanitary ordinances to the changes made by the act, in the administration of the sanitary affairs of the city, and authorizes and empowers the board to add to the sanitary code, from time to time, additional provisions for the security of life and health in the city, and declares that any violation of the code shall be treated and punished as a misdemeanor, and the offender shall also be liable to pay a penalty of fifty dollars, to be recovered in a civil action in the name of the mayor, aldermen and commonalty of the city.

Held, that the third count of the indictment was drawn with reference to the ordinance cited, and to ascertain the specific punishment for the offence, reference must be had to the general statute, which enacts that "every person who shall be convicted of any misdemeanor, the punishment of which is not prescribed in this or some other statute, shall be punished by imprisonment in the county jail not exceeding one year, or by a fine not exceeding \$250, or by both such fine and imprisonment."

Held, that the court in this case imposed its sentence of fine and imprisonment under the third count of the indictment which described the crime to be a violation of the ordinance, which violation was declared to be a misdemeanor, the punishment of which was nowhere prescribed except in the revised statutes, which is recited above.

Held, that the joinder of several distinct misdemeanors in the same indictment is not a cause for the reversal of the judgment on writ of error when the sentence is single, and is appropriate to either of the counts upon which the conviction was had.

Held, that the Legislature in the exercise of its constitutional authority may lawfully confer on boards of health the power to enact sanitary ordinances, having the force of law within the districts over which their jurisdiction extends. This power has been repeatedly recognized and affirmed, and ordinances de-

signed to prevent the sale of adulterated milk are manifestly within the scope of sanitary regulations.

Held, that the statute of 1862, relates only to *selling or exposing* impure or adulterated milk for sale, while the offence in the ordinance is, *bringing adulterated milk into the city of New York for sale*, therefore a greater punishment can be inflicted under the ordinance than is authorized by the statute.

Duplicity in the third count was urged on the ground that such count united the offence of bringing impure milk into the city for sale with the charge of offering it for sale; the one being a violation of the ordinance, and the other a violation of the statute — offences requiring different punishments.

Held, that the objection of duplicity is not well taken. The third count purports to proceed exclusively upon the ordinance, and would not justify a conviction under the statute, although it contains averments which might sustain a count for the statutory offence. The allegation of the offering of the milk for sale may be rejected as surplusage, leaving the conviction to stand upon the charge of bringing it into the city for sale. *Polinsky v. The People*, 469.

28. The judges of the Circuit Court of the United States for the Southern District of New York, certified their division of opinion in this case.

The defendant was indicted in the Circuit Court for the Southern District of New York, for an alleged offence against the United States, described in the ninth subdivision of section 5132 of the Revised Statutes. All of that statute applicable to this case reads as follows: "every person respecting whom proceedings in bankruptcy are commenced, either upon his own petition or that of a creditor," who, within three months before their commencement, "under the false color and pretence of carrying on business, and dealing in the ordinary course of trade, obtains on credit from any person any goods or chattels with intent to defraud," shall be punished by imprisonment for a period not exceeding three years.

The indictment charged the defendant with having, within three months previous to the commencement of his proceedings in bankruptcy, purchased and obtained on credit goods from several merchants in the city of New York, upon the pretence and representation of carrying on business and dealing in the ordinary course of trade as a manufacturer of clothing; whereas he was not carrying on business in the ordinary course of trade as such manufacturer, but was selling goods to some parties by the piece for cost, and to other parties at auction for less than cost, and that these pretences and representations were made to defraud the parties from whom the goods were purchased.

Upon the trial the defendant was convicted, and on motion in arrest of judgment, the Court were opposed in opinion and they certified the question upon which they differed as follows: — "If a person shall engage in a transaction which, at the time of its occurrence, is not a violation of any law of the United States, to wit, the obtaining goods upon credit by false pretences, and if, subsequently thereto, proceedings in bankruptcy shall be commenced respecting him, is it within the constitutional limits of congressional legislation to subject him to punishment for such transaction considered in connection with the proceedings in bankruptcy?"

Held, that an act which is not an offence at the time it is committed cannot become such by any subsequent independent act of the party with which it has

no connection. The criminal intent essential to the commission of a public offence must exist when the act complained of is done : it cannot be imputed to a party from a subsequent independent transaction.

Held, that the act described in the ninth subdivision of section 5132 of the Revised Statutes is one which concerns only the State in which it is committed : it does not concern the United States.

Held, that the answer to the question certified must be in the negative.
United States v. Fox, 476.

29. The objection was made upon the argument, that the copy of the indictment in the record does not contain the indorsed certificate of the foreman of the grand jury that it is a true bill.

Held, that as no such point was made on the trial it is not available in the appellate court. If it were, the record states that the grand jury appeared in open court, and duly presented the indictment, a copy of which is set forth. From this it must be assumed that it was presented according to law.

Held further, that the certificate of the foreman is no part of the indictment, but is the statutory mode of authenticating it, and the record furnishes evidence that it was so authenticated. *Brotherton v. The People*, 520.

30. The accused was tried and convicted in the Court of Sessions of the Peace, in and for the county of Kings, and, upon a general verdict of guilty, the court sentenced the prisoner to the penitentiary for the term of ten years. The prisoner was convicted under the Laws of 1872, in relation to abortions. The first two counts of the indictment were under the first section, and the third count under the third section of that act. The prisoner pleaded not guilty to the whole indictment, and did not ask the court at the trial to compel the district attorney to elect upon which count or counts in the indictment the trial should proceed. At the close of the evidence on both sides, the counsel for the defendant, asked the court to acquit the accused under each count. The court declined, and an exception was taken. The court charged the jury that a general verdict of guilty would cover all the counts, but that if they should find the prisoner guilty only under the third count, their verdict should be "guilty under the third count." After the return of a general verdict of guilty, by the jury, the prisoner's counsel moved in arrest of judgment, which was denied and the prisoner was sentenced. The objection raised was, that the indictment was defective inasmuch as it charged two distinct felonies, one under the first section, and one under the third section of the statute.

Held, that the objection is not well founded. All the counts are under the same statute, and relate to the same transaction. In such a case it matters not that the offence alleged to have been committed is charged in different ways in several counts for the purpose of meeting the evidence that may be adduced. And it matters not that the offences alleged in the different counts are of different grades, and call for different punishments. Burglary with an attempt to commit larceny, with a count for larceny ; burglary and larceny ; rape and an assault with an attempt to commit rape ; larceny and receiving stolen goods ; assault with intent to kill and a simple assault may be united, and it matters not that the offences thus united call for different punishments ; so long as all the counts relate to the same transaction. *Hawker v. The People*, 524.

31. The accused was tried and convicted in the Court of General Sessions of the county of New York of the crime of assault with an attempt to commit a rape. There were two counts in the indictment, and the accused was convicted under the second count. The court was asked to charge the jury, that there could be no conviction under the second count, because the intent was not alleged to be, *carnally and unlawfully to know the child*. The court refused to charge as requested, and an exception was taken.

The second count in the indictment charged the accused with an assault upon one Statia Gluth; she then and there being a female child of the age of six years, with intent then and there in and upon her, the said Statia Gluth by force and violence to then and there wilfully and feloniously commit a rape, against the form of the statute, etc.

Held, that the crime of rape, where the subject thereof is an infant child is, by statute, "the carnally and unlawfully knowing a female child under the age of ten years." Inasmuch as the indictment charges a felonious assault upon a female child of the age of six years, with the intent wilfully and feloniously to commit a rape, we think the facts constituting the offence are set forth with sufficient particularity. *Singer v. The People*, 547.

32. The accused were indicted at the Orleans Oyer and Terminer for a conspiracy to cheat and defraud one Marcia A. McIlrath. They were tried and convicted in the Court of General Sessions of the same county.

The counsel for the accused insists, that the indictment is defective inasmuch as it does not allege that they conspired to get from the complainant more than the tobacco was worth; and that it was not worth twenty cents per pound, the price paid by the complainant.

Held, that it was of no consequence what the tobacco was worth, the crime consisted in the fact that Stone and Black confederated together to get from the complainant five cents more a pound than they were entitled to, and to divide that amount between them. The indictment contains the only allegation required to describe the offence. *Stone v. The People*, 553.

INSANITY.

1. The prisoner was indicted and convicted of an assault, with intent to kill. The defence was insanity. Dr. Clymer was sworn and examined as a witness, on the part of the defence. He testified that he was a physician and understood the indications and symptoms of the existence of the form of insanity by which it was claimed the prisoner was affected, and that the facts relied upon, indicated unsoundness of mind.

In submitting the case to the jury the court said, that he "placed no reliance whatever upon Dr. Clymer's testimony, except what is due to the testimony of a sensible and honest gentleman; but I have equal respect for the opinion of you, gentlemen, who, as men of the world, having attained a mature age, and seen life in many of its phases, are quite as competent, perhaps, to pass upon this testimony as experts, as is Dr. Clymer."

Held, that this language conveyed to the jury the opinion of the court that it was their duty to disregard the evidence of the witness as an expert and was, therefore, error. The evidence of medical experts is admitted on questions of

insanity, on the ground that jurors are not deemed equally skilled and as able to decide whether insanity exists, as are such experts. The jury is to determine what weight is to be given to such testimony and they must be left at liberty to exercise their judgment on the subject, without being controlled by any positive direction by the court. *Templeton v. The People*, 108.

2. *Held* that, take the two paragraphs of the charge together, there was no error. The question may be stated in a variety of language. There is no right rule prescribing the particular terms to be employed, if the substance of the rule is preserved. The jury could not have misunderstood their duty under these instructions, nor have been misled by them.

Held further, that crimes can only be committed by human beings who are in a condition to be responsible for their acts, and upon this general proposition the prosecutor holds the affirmative, and the burden of proof is upon him. Sanity being the normal and usual condition of mankind, the law presumes that every individual is in that state. Hence a prosecutor may rest upon that presumption without other proof. The fact is deemed to be proved *prima facie*. Whoever denies this or interposes a defence based upon its untruth, must prove it; the burden of showing insanity is upon the person who alleges it, and if evidence is given tending to establish insanity, then the question is presented, whether the crime was committed by a person responsible for his acts. Upon this question the presumption of sanity, and all the evidence are to be considered, and the prosecutor holds the affirmative, and if a reasonable doubt exists as to whether the prisoner is sane, or not, he is entitled to the benefit of the doubt, and to an acquittal.

Held further, that the question relating to the state of the prisoner's mind at the time the alleged act was committed, was a question of fact, and was fully litigated and fairly submitted to the jury, and their decision is conclusive.

The judge in his charge to the jury expressed himself as follows: "This allegation of insanity is an affirmative issue, which the defendant is bound to prove, and you must be satisfied from the testimony introduced by him that he was insane." "If there is a well founded doubt whether this man was insane at the time he fired the pistol, you will acquit him." *Brotherton v. The People*, 520.

JURORS.

1. One Perry, drawn and appearing as a juror, was challenged by the prisoners, and on examination it appeared that at the time he was put on the jury list he was a freeholder owning a farm in Guilderland, for which he was assessed, but was not assessed for personal property. The challenge of the prisoners was withdrawn, but renewed by the prosecution and the juror discharged.

The qualifications of jurors are prescribed in the directions to the town officers whose duty it is to select them and prepare the lists from which the ballots are prepared for the drawing of jurors. (2 R. S., 411, § 13.) The direction is to take such only as possessing the other qualifications, are at the time assessed for personal property belonging to them in their own right to the amount of \$250, or who shall have a freehold estate in real property in the county belonging to them in their own right, or in the right of their wives, to the value of

§150. The juror was not qualified, and could not, at the time of the trial, have been selected as a juror by the town officers, or been placed on the list of jurors. The right of challenge for want of proper qualifications is a strictly legal right, and must be determined by the statute prescribing the qualifications. The property qualification of the juror, so far as it depends upon the ownership of personalty, must appear and be evidenced by the assessment roll, and suitors are entitled to the benefit of the challenge if this is wanting. There was no error in disposing of the challenge and holding that the property qualification when questioned by a challenge must be that required to authorize the original selection of the individual as a juror. *Kelly v. The People*, 80.

2. The accused was convicted of burglary in the third degree, by the Court of General Sessions in and for the city and county of New York.

Before the grand jury, by whom the accused was indicted, was sworn, his counsel interposed a challenge to the array, on the grounds that Douglas Taylor, who was legally elected and who qualified as commissioner of jurors did not select the grand jury nor was such jury selected by any one authorized by him; that they were illegally selected by one Thomas Dunlap, who had been appointed in the place of said Taylor by the Mayor, and that the act of the legislature, under which the Mayor acted, was unconstitutional, to which the district attorney demurred, and the demurrer was sustained. On the trial the counsel for the prisoner challenged the array of the petit jurors upon the same grounds. This challenge was demurred to, and the demurrer sustained.

Held, that the challenge to the array of grand jurors was properly disallowed. The Revised Statutes do not allow such a challenge.

Held also, that the challenge to the array of petit jurors was properly disallowed. On the face of the challenge it appeared Thomas Dunlap who selected the petit jurors had been appointed commissioner of jurors and was, therefore, a *de facto* officer.

Held further, that the validity of the appointment of Dunlap could not be drawn in question in this collateral manner. *Carpenter v. The People*, 279.

8. The prisoner was tried in the Court of Oyer and Terminer of the city and county of New York, and convicted of the crime of murder in the first degree.

There were four counts in the indictment. The first count alleged that the prisoner committed burglary of the store of one James H. Noe with the intent to steal. That during the commission of the burglary he struck said Noe upon the head with a bar of iron, wounding him and of which he died and in that manner committed murder. The second count alleged that the killing was done while the prisoner was committing robbery from the person of the said Noe. The third count alleged that the killing was with the deliberate and premeditated design to effect the death of said deceased. The fourth was the common law count for murder.

The prisoner plead in abatement to the indictment that the grand jury which found the same were not drawn according to law, when the district attorney demurred to the plea, the prisoner's counsel joining, and the plea was overruled.

The counsel for the accused challenged the array of petit jurors, the district attorney demurred to the grounds of this challenge, and it was overruled. The grounds of both challenges are fully set out in the opinion of Judge EARL.

Held, that in the plea there was no allegation of any corruption, dishonesty or unfairness on the part of any of the officers in selecting and drawing the grand jurors, or of any design to injure the defendant or any other person, and it contains no allegation that any of the persons who were upon the grand jury which indicted the defendant did not possess the qualifications of grand jurors, or that any person was upon the jury who would not have been there if all the forms of law which are claimed to have been disregarded, had been strictly complied with. It is not denied that the jurors were selected at the proper time and place. It is not alleged how persons came to be selected whose names were not upon the petit jury lists, nor how many were thus selected. In such a case the whole list cannot be held to be irregular and null, so that none of the persons on it could be drawn for grand jurors, because a few names, without fraud or design, were, by accident or oversight, also put on it.

Held, further, that as there is no allegation in the plea that the drawing was not made by a person acting and claiming the right to act as commissioner, such drawing may have been made by a *de facto* commissioner, and he may have been recognized as such by all the officers who had relations with him or his work. A jury drawn by a *de facto* commissioner would be as regular as one drawn by a *de jure* commissioner. *Dolan v. The People*, 287.

4. The prisoner was convicted in the court of Oyer and Terminer held in Cayuga County of the crime of murder in the first degree, for killing a fellow prisoner in the Auburn State prison, with a knife.

On the trial one De Witt was called as a juror and, by the prisoner, was challenged for principal cause. He was sworn and testified that he had heard the killing talked about, had expressed an opinion of the affair from what he had heard talked, and then had an impression or opinion as to the guilt or innocence of the prisoner if what he had heard was true; that he thought it would take evidence to remove that impression, and that he would not go into the jury box entirely unbiassed; that the impression depended entirely upon the supposition that what he had heard was true; that if he went into the jury box he would decide the case on the evidence given, and that he believed if he was sworn as a juror he could render an impartial verdict upon the evidence unbiassed or uninfluenced by any impression or opinion which he then had. The court overruled the challenge.

The prisoner then challenged De Witt for favor, and that challenge was overruled. The prisoner's counsel excepted to each ruling. De Witt was then sworn as a juror.

Held, that the challenge for principal cause was properly overruled under the act of 1873.

That act provides that a present opinion or impression in reference to the guilt or innocence of the prisoner, or the expression of such an opinion, shall not be a sufficient ground of challenge for principal cause, provided the person proposed as juror shall declare on oath that he verily believes that he can render an impartial verdict according to the evidence and that such opinion or impression will not bias or influence his verdict, and provided the court shall be satisfied, that the person does not entertain such a present opinion as would influence his verdict as a juror.

Held, further, that this provision has relation to the challenge for principal cause only. The challenge for favor is left unaffected by it.

Held, that the challenge for favor is to determine the indifference of the person challenged and is to be tried by the court, and such decision is subject to review the same as other questions arising upon the trial. The court heard the juror testify and was able to judge somewhat from his appearance. He swore that he would decide the case upon the evidence, and that he believed that he could render an impartial verdict upon the evidence, unbiassed and uninfluenced by his impressions. The court properly held the juror indifferent. *Thomas v. The People*, 298.

5. *Held*, that the challenge to the juror Lamb was properly overruled. Though some of his answers, taken separately would perhaps have established a disqualification, yet the effect of all that he said was to show him a proper juror, under the late statutes. *Phelps v. The People*, 383.

6. The accused was indicted, tried and convicted for the crime of murder in the first degree, before the Court of Oyer and Terminer in and for the county of Oswego. The General Term of the Supreme Court, in the fourth judicial department sustained the judgment and the accused brought error.

This case is decided upon the questions arising out of the overruling of the trial court of the plaintiff's challenges to two of the persons who were sworn as jurors and found him guilty. One of them was challenged for principal cause and both for favor.

Held, that there has always been, and there is yet, notwithstanding modern legislation, a distinction between the two kinds of challenge. If one has expressed an opinion on the prisoner's guilt, it is a good ground of challenge for principal cause. If he had formed an opinion, upon reports and what he had read, of the prisoner's guilt or innocence of the accused, which it would need testimony to remove, he was disqualified — not being indifferent and impartial.

Held, that as the court is now the trier of the challenge for principal cause, as well as the challenge for favor, and when the latter immediately succeeds the other, the appellate court may consider all that has been said by the person proposed as a juror, on his examination on both challenges, or on either of them.

Betts was challenged for principal cause, as having formed and expressed an opinion, and for favor, as not being indifferent and impartial.

This juror said he had read in a local newspaper a part of the testimony given for the people on the former trial of the accused; had heard others talk about that trial, a good deal; he had never expressed an opinion but had formed an impression, as to the guilt or innocence of the accused, from what he had heard and read as to it, and it would take evidence to remove such impression. He said that he thought that his previously formed opinion or impression would not bias or influence his verdict at all, and that he could take the case and decide it fairly according to the testimony without reference at all to any opinion he might have had. He further said that his opinion or impression was formed, on a supposition that the evidence which he had read was true, and if sworn as a juror he would enter upon the trial with an impression as to the guilt or innocence of the accused, and that at that present time he had an opinion as to his guilt, and that he supposed that he had an opinion against him as to his character, as a man. He also said that the opinion or impression was formed by him on reading the testimony in the newspaper, that he still entertained the same, and had never had cause to change, nor to doubt the truth of it.

Jennings, the other juror was challenged for favor, as not being impartial or indifferent between the People and the prisoner. He had formed an impression as to the guilt of the prisoner from reading parts of the published testimony, and from the talk of people, which he thought he had expressed, which impression he still had ; but he thought he could remove it, and would do it, and would be sure to, if he was sworn as a juror ; that he thought he could render a verdict without being influenced by any impression or opinion that he might have had, and that it would not bias or influence his verdict, and, that he verily believed that he could render an impartial verdict according to the evidence, notwithstanding any impression or opinion he might have formed.

Held, that the word "impression" as used in this case by these jurors, conveys the idea that these persons had more than a doubt. There had been an effect produced upon their minds, which remained, and which was so firmly lodged there that it needed a newcoming force to dislodge it. They had received it into their minds as true that the prisoner was guilty, without certain knowledge of it, but upon proofs which they held satisfactory.

Held, that it matters not what the state of mind thus produced is christened, whether an opinion or an impression, for the conclusions of these jurors, as to the guilt of the accused, is equivalent to what the books call an opinion.

Held, that the accused was tried and found guilty of murder in the first degree, by a jury, two of whom had formed, and one of them had expressed an impression that he was guilty, which impression each of the two still had, when he went into the jury box ; an impression so strong, as that in the case of one of them, it would need testimony to remove it, and in the case of the other, it did not affirmatively appear, that it would not, and it was clearly to be inferred that it would.

Held, that on the other hand, the jurors who were challenged, each professed a purpose to render a fair and impartial verdict upon the evidence, and each stated his belief to be that he could and would do so.

Held, that the Laws of 1873, provides that all challenges of jurors shall be tried and be determined by the court only; and that, either party may except to the determination, and upon writ of error or certiorari the court may review it, the same as other questions arising upon the trial. This gives power to the appellate court to review that determination both on questions of law and questions of fact.

Held, that in this case there is only the question of fact, whether the two persons proposed, or either of them, had such a bias against the prisoner, as not to stand indifferent?

Held, that one who has formed an opinion from the reading or report, partial or complete, of the criminatory testimony, against a prisoner, on a former trial, however strong his belief and purpose that he will decide the case on the evidence to be adduced before him as a juror and will give an impartial verdict thereon, unbiassed and uninfluenced by that impression, cannot be readily received as a juror indifferent towards the prisoner and wholly uncommitted. Therefore the challenge to the favor should have been sustained. *Greenfield v. The People*,
479.

MANDAMUS.

1. The General Term of the First Department denied a motion for a mandamus to compel the Court of Oyer and Terminer, to settle and seal a proposed bill of exceptions. The bill of exceptions was presented to the court for settlement, but they declined to proceed on the ground that the defendant is still a "fugitive at large, and beyond the control and without the power of the authorities of this State, he having made his escape and absconded from their custody after his conviction, and while awaiting the action of the court upon it."

Held, that an escaped prisoner cannot take any action before the court. The whole theory of criminal proceedings is based upon the idea of the defendant being in the power, and under the control of the court, in his person. The provisions of the statutes, giving to defendants in criminal cases the right to make a bill of exceptions, are not so absolute as to displace all the other principles which belong to criminal proceedings, but must be taken in subordination to them. *The People v. Genet*, 157.

MANSLAUGHTER.

1. The prisoner was indicted on the 24th of April, 1872, for the crime of manslaughter in the second degree. The indictment charged the commission of the crime on the 15th of March, 1872, and he was tried on the 24th of April, 1872, and found guilty.

The General Term held that the act of 1869, under which the prisoner was indicted, was repealed by section 1 of chap. 181, Laws of 1872, but such provision continued in force, as to offences committed prior to the taking effect of the repealing statute, by the saving clause in the general repealing act of 1828. (§ 6, chap. 21, Laws of 1828-1829.)

Held, that the act of 1869 is not repealed in terms or by express reference, and it is not repealed by implication, unless the two statutes are manifestly repugnant and inconsistent, or the later statute covers the whole subject-matter and was intended as a substitute for the former. The law of 1869 ceased to be operative upon offences committed after the 6th of April, 1872, the time at which the later act became a law. The two acts making different and incompatible provisions in respect to the same subject they could not both stand, and the earlier act was abrogated as to all future offences.

Held, that the act of 1872 did not deal with past offences or affect to do so; and as to them there was and could be no inconsistency or repugnancy between the two acts, but each could have full effect — the one as to offences prior to the 6th of April, 1872, and the other to offences thereafter committed.

Held, that the general rule is that laws, whether civil or criminal, are prospective, and not retroactive in their operation and effect, and the laws relating to crimes and their punishment cannot be made to retroact; and if the attempt is made by law to punish an act, already committed, which was not a crime when committed, or to subject an offence already committed to a new or additional punishment, the law will be void, as *ex post facto*.

Held, that, if the act of 1872 had been general in its terms, and covered the whole subject-matter of the former statute, and had not, in terms, been restricted

to offences thereafter committed, it might have operated as a repeal, by implication, of the old law, but a repeal of a statute by implication is not favored, and is only allowed when the inconsistency and repugnancy of the two acts are plain and unavoidable. *Mongeon v. The People*, 50.

MAYHEM.

1. The accused was convicted of the crime of mayhem. The General Term of the first judicial department affirmed the judgment of the Court of General Sessions, of the city and county of New York. The accused brought error.

The evidence showed, that the accused and the complainant had been playing cards together and got into a quarrel over the game, which resulted in a fight. The parties closed and during the struggle the accused bit off a piece of complainant's ear.

The counsel for the accused asked the court to direct the jury to acquit on the ground, that the offence of mayhem was not proved, as it was not shown that there was a premeditated design "evinced by a lying in wait for the purpose, or in any other manner" as prescribed by the statute. The court refused so to direct the jury, and the counsel for the prisoner excepted.

The court charged the jury: "If you should be satisfied from the evidence, beyond a reasonable doubt, that the prisoner did wilfully and intentionally seize the complainant's left ear with his teeth with the intention of biting it off, and did wilfully and intentionally bite it off on purpose, you will be authorized to find that he bit off the ear from premeditated design, though you should find from the evidence that his design, or intention thus to seize and bite off the ear was first premeditated or originated but an instant before he seized the ear with his teeth." To all which the counsel for the accused excepted.

Held, that the statute under which the plaintiff was indicted and convicted reads as follows: "Every person who, from premeditated design, evinced by lying in wait for the purpose or in any other manner, or with intention to kill or commit any felony, shall (1) cut out or disable the tongue; or, (2) put out an eye; or, (3) slit the lip or slit or destroy the nose; or, (4) cut off or disable any limb or member of another, on purpose, upon conviction thereof shall be punished," etc.

Held, further, that according to the statute there must be a premeditated design, which must be shown by lying in wait for the purpose, or in some other manner. There must be a design or intention existing and a purpose to do this very act, and this must be the result of premeditation. The words "in any other manner," must be construed in connection with and in reference to those which precede them in the same section; and when thus interpreted they evidently mean in like or similar manner.

Held, further, that this interpretation of the language stated is also sanctioned by the last clause of the section, which provides that the cutting off or disabling of any limb or member must be done "on purpose." Where the offence is committed within the meaning of the statute, it must be done "on purpose" as well as with a "premeditated design." *Godfrey v. The People*, 209.

2. See note referring to Penal Code as to the change of name of his crime from Mayhem to Maiming, 213.

3. The accused was tried and convicted of the crime of mayhem, at a court of Oyer and Terminer of the county of Kings.

The indictment charged the accused, in substance, with wilfully and feloniously and with premeditated design making an assault upon one Walter Westlake and did then and there wilfully and feloniously and from premeditated design, with his teeth, did cut, bite, slit, and destroy on purpose, with intent, then and there and thereby, in manner aforesaid, the thumb of the said Walter Westlake, then and there to maim and disfigure, against the form of the statute, &c.

On the trial it was shown, that the accused and Westlake were riding in the same street car in the city of Brooklyn; the accused not paying his fare was put off by the conductor; that he soon got on again and forced his way into the car, saying, "Let me in till I eat somebody." After he got in he caught hold of the conductor and bit his thumb. Westlake told him to be quiet as there were ladies in the car; he then sat down. Not long after the accused jumped up, struck Westlake, and seized his nose with his teeth. Westlake put up his hand to protect his face when the accused took hold of Westlake's thumb with his teeth and began chewing it, and continued to chew it until he reached the platform of the car and was forced off by the other passengers. The thumb of Westlake was permanently disabled.

At the close of the evidence the counsel for the defendant requested the court to charge the jury:

First. "Under the indictment in this case, the defendant cannot be convicted of mayhem, in cutting off or disabling the thumb of the complainant.

Second. "The indictment does not allege that the thumb was cut off or disabled.

Third. "The allegation in the indictment that the thumb was destroyed, is disproved by the evidence, the thumb still being perfect on the hand of the complainant, whether disabled or not.

Fourth. "There is no evidence, in the case, of premeditated intent, such as is called for by the statute defining the crime of mayhem.

Fifth. "The premeditated attempt required by the statute, must be evinced by lying in wait or some similar means, and no such evidence has been offered in the case.

Sixth. "The indictment in this case is not sufficient as an indictment for mayhem, and is only good as an indictment for assault and battery."

The court declined so to charge, but did charge, that as to the first three propositions, the word "destroy," as used in the indictment, necessarily included the word "disabled," and that proof that the thumb was disabled answered the averment, and was sufficient to sustain the indictment. The counsel for the prisoner duly excepted.

Held, that the offence is complete whenever a person having formed a design to maim another, proceeds to and does execute it. The jury must find as a fact, before there can be a conviction, that there was a premeditated design to maim, and it must be averred in the indictment.

Held, that the manner in which this design was evinced, and the circumstances establishing it are matters of evidence to be proved on the trial; the

issue being, whether the particular injury was deliberately and intentionally committed.

Held, that the English statute made the maiming of another an offence only when there was premeditation evinced in a particular manner, viz., "by lying in wait." The intention of our statute was to enlarge the definition of the offence, and to include within it all cases of designed and premeditated maiming, and the words "or in any other manner," were inserted for that purpose.

See *Godfrey v. The People*, ante, 209.

Held, that it is a well settled rule of criminal pleading that an indictment upon a statute, must state all the facts and circumstances which constitute the statutory offence, but it is not necessary that the words of the statute should be precisely followed. Words of equivalent import may be substituted, or words of more extensive signification, and which necessarily include the words used in the statute. The word "destroy" used in the indictment is more comprehensive than the word "disable," and it includes what is signified by it, and the indictment is not defective by reason of the substitution.

Held, that it was proper to leave the question to the jury whether the prisoner, by premeditated design, inflicted the injury complained of. The design must precede the conflict, and not originate with or grow out of it. But it is a question of fact for the jury. *Tully v. The People*, 253.

4. The Court of General Sessions of New York city and county, with a jury, convicted the accused of the crime of mayhem, and he was sentenced by the Recorder to imprisonment in the State prison for the term of fifteen years.

The indictment charged, that the accused did feloniously bite off a piece of the left ear, and disable a member of one James McLaughlin, and that he did feloniously and on purpose maim him, against the form of the statute.

On the trial the prosecution asked a witness, under objection, "Do you remember what McLaughlin said about Burke's coming into the store?" The answer was, "Yes, sir; he told me, when I wanted him to go and sit down and and go to sleep, that he was afraid Burke would come in and beat him. I said 'nobody will beat you; sit down and go and take a sleep.'" A motion was made to strike out this answer, and it was denied.

Held, that the statement of the complainant before the occurrence, when the prisoner was not present, was not admissible. In the exercise of a sound discretion, the testimony should have been stricken out. It was entirely incompetent.

The court was asked to charge the jury that the fact of lying in wait was not made out by the prosecution. The court declined, and an exception was taken.

Held, that the prosecution did not make out the fact of lying in wait, contemplated by the statute. The jury could not assume that he was, when the evidence did not warrant it; and the absence of proof of a material fact like that, was a feature in the prosecution to which the prisoner was clearly entitled.

The court was also requested to charge the jury that the offence committed was not mayhem, as contemplated by the statute. The court declined so to charge, and the prisoner's counsel excepted. The court did charge, that it was a question for the jury to say whether his ear was bit off by this man, and whether there was any disability to the ear from this partial destruction. If

they shall so decide, I shall instruct them to convict this man of the charge. There was an exception to this.

Held, that, under the evidence, the Recorder was in error. There was no evidence that the ear was disabled. The physician did not so state. Its perfection was destroyed, but its usefulness was not affected. The disability was not for the speculation or conjecture of the jury, but to be considered and disposed of on the evidence. *Burke v. The People*, 258.

MURDER.

1. The defendant was indicted for the murder of his wife, and the jury found him guilty, with a recommendation to mercy.

On the trial it was shown, under objection, that the accused on the Saturday evening before her death left the house of Mary Campbell, the witness, "with clothing for her husband, who was a watchman on some ship in the North River, as she said; she did not return until five o'clock the next morning; when she came in she appeared very ill; she said she got sick on board the vessel on which her husband was; she said she had not been drinking; she said that her whole frame seemed as if it were on fire, and her heart felt awful."

The court charged the jury that they might infer that the deceased was with her husband on the Saturday night preceding her death, although the evidence on that point was very slight. Exception was taken to this by the counsel for the prisoner.

Held, error. The intention of the deceased in going from the house of the witness with clothing was not material; it was not part of the *res gestæ*, nor was the declaration of the deceased that she was ill, competent as a dying declaration; for although the deceased returned very ill, there is no evidence nor any reason to believe, that she apprehended a fatal result.

Held, that the admission of the recognizance in evidence without proof of its execution; its having been properly filed; or the identification of the persons recognized, was error. *The People v. Williams*, 18.

2. The accused was tried and convicted of murder in the second degree.

The court charged the jury that in murder there must be an intent to kill, and that to constitute manslaughter it was not necessary that there should be such intent; and that the courts looked leniently upon a man who slays his wife, when caught in the act of adultery, from the excitement consequent upon the discovery and a momentary deprivation of control on his part; and that was covered by the "heat of passion" when there was no intention to kill, as used in the statutes defining manslaughter.

The court submitted to the jury whether, from the evidence, they believed that the prisoner had caught his wife in the act of adultery, or that the circumstances justified him in concluding that she was committing adultery, and whether he was under the excitement and in the heat of passion which that discovery would be likely to produce, and did the act under it.

Held, that the charge was a clear exposition of the law. The meaning of it was, that if the prisoner killed his wife under these circumstances, and without a premeditated design to effect her death, the offence would be manslaughter in some of its degrees.

The counsel for the accused requested the court to charge: "that the law regards adultery as so great a provocation and makes such allowance for the passion which its discovery excites, that it *absolutely* reduces the grade of the offence of killing to manslaughter, and that in the lowest degree." This the judge refused, except as already charged.

Held, no error. The request does not confine the case to one of a sudden killing, immediately following discovery in the act; it might embrace one of a subsequent deliberate killing, out of jealousy or revenge, and it is far too strong in stating that the provocation absolutely reduces the grade of the offence. Whether it does or not, must depend upon the circumstances of each particular case. It cannot be laid down as a rule of law that adultery gives a license to kill either of the offending parties without being guilty of murder.

Held, further, that the question in all cases is, whether the act was done with intent to kill, or, whether it was done in the heat of passion engendered by the sudden discovery, and without intent to kill. Adultery, though provocation of the gravest character, is still but provocation, it is not justification; and every intentional killing, however extreme the provocation, is and was, under our statute, murder, unless justified as provided in the statute. *Shufflin v. The People*, 189.

3. The accused was indicted for the murder of his wife, by poisoning with corrosive sublimate, and Sarah Briggs was jointly indicted with him, as accessory before the fact.

On the trial it was shown by the people, under objection, that the deceased stated during her illness, and after she had abandoned hope of recovery, "that Charles and the Briggs woman was the cause of all this suffering, the cause of all this. That Charles and the Briggs woman knew all about this—something to that effect." "I talked with Mrs. Shaw only once about the cause of her sickness; she said she expected it was Charles and Mrs. Briggs."

Held, that these declarations were erroneously received, for the reason that they were not narratives of facts, but were conclusions or conjectures of the deceased as to the cause of her illness. Neither of these statements would have been competent evidence if the deceased had been alive and examined as a witness under oath; and they were therefore equally inadmissible as dying declarations.

The counsel for the accused offered to prove that the deceased said several days before her sickness, "that she had poison and knew how to use it; and that rather than Mrs. Briggs should have her children, she would put them all under the sod;" and also, "that rather than Mrs. Briggs should be step-mother to her children, she would put them under the sod." The court rejected the evidence and an exception was taken.

Held, error. The prosecution were permitted to give in evidence the threats of the accused against the life of the deceased, and it was equally proper for the accused to prove the threats of the deceased against her own life and the lives of her children.

The court for the trial of the prisoner was organized by there being upon the bench the circuit judge, the county judge of Washington county, and the two justices of the peace, designated as justices of the Sessions of said county. Several days were devoted to the taking of evidence, and an adjournment was

had over Sunday. On Monday, when the court re-assembled, *Justice Steere* was absent. The trial proceeded and evidence was taken on Monday, and on Tuesday *Justice Steere* returned and resumed his seat upon the bench, joined the court, and took part in its deliberations during the subsequent part of the trial.

Held, that the participation of *Justice Steere* in the trial after his absence from the court-house, while the whole of Monday's evidence was given, was against the provision of the law and Constitution giving a jury trial before a regularly constituted court, the members of which should hear all the evidence and proceedings. *Shaw v. The People*, 200.

4. The prisoner was tried and convicted, in the Oyer and Terminer, held in Rockland county, of the crime of murder in the first degree, in killing Matilda Hugus.

On the trial the witness Gamble, who was in the room when the shot was fired by the accused, which killed the deceased, testified on the part of the people that he was the defendant in three suits brought against him by the accused and his brother; that he had been several times to attend the trial of them, and that each time Mrs. Hugus, the deceased, had accompanied him; and that he knew what the suits were for. The district attorney then asked Gamble, "Tell the jury what they were for?" An objection was taken by the counsel for the prisoner, and overruled by the court. The witness then stated that the suits were brought to set aside deeds from his wife, the sister of the accused, to him. The wife of the witness was dead, and it was shown that the suits were set down for trial on the Monday after the murder.

Held, that it was clearly competent for the people to show that a litigation was pending between the prisoner and Gamble, and also the nature of the litigation, as bearing upon the existence of a motive on the part of the prisoner to commit the murder. It was left uncertain whether the design of the guilty party was to kill the deceased or Gamble. Both were in a position to be reached by the discharge of the gun or pistol, although it proved fatal only to Mrs. Hugus. The strength of the motive might depend upon the nature of the controversy and the extent of the pecuniary interests involved.

The objection is now taken that parol evidence cannot be given of the object of the suits, and that the pleadings were the best evidence of the issues in the actions.

Held, that as no objection of this kind was taken on the trial, it is not now available.

On the trial Pinkerton, a witness, was examined and in answer to the question as to what the measurements taken by him were, answered "I measured from the outside of the flower bed where the man stood," and then upon objection being made, said, "from where the footprints were up to the window, where the shot went in, was five feet three and-a-half inches, inside two feet eleven inches. I had a man sit in a chair, and measured from the floor to the top of his head." Prisoner's counsel moved that the first part of the answer be stricken out, on the ground that there was no proof that the witness knew where the man stood, and that the last sentence of the answer be stricken out on the ground that the testimony was irrelevant. The motion was denied and an exception taken.

Held, that the denial of the motion was not error. The first part of the answer

assumed that the man by whom the footprints were made, stood at that place, but on objection being made the witness changed the form of the answer. The measurement of two feet and eleven inches, was the distance from the floor to the window, and had no reference to the measurement in question.

A witness who was sworn on the part of the people, testified in relation to the conversation between the prisoner and Pinkerton, at the sheriff's office, under objection.

Held, that the general rule applicable as well in criminal as civil cases is, that the declaration of a party, in respect to the subject-matter under investigation, whenever made, are admissible against him. This is qualified by the exception to the rule that, whenever the declarations of a person charged with crime are not voluntary within the legal meaning of that term, they are not competent and cannot be admitted in evidence. In this case it appeared that the declarations of the prisoner narrated were reduced to writing at the expressed desire of the accused, therefore there is no ground for the suggestion that the statement was not voluntary.

It was shown by the people, that on the evening of the murder and after it was committed, a mask was found under the window where the shot was fired, and during the conversation with Pinkerton, before alluded to, the prisoner was asked by one Schute "where did that mask come from?" He answered, "the children got that from the ragamuffins," and immediately added, as if recollecting himself (so the witness stated), "that mask had a black nose, and was torn down the face." The counsel for the prisoner moved to strike out the testimony as to the mask, on the ground that the mask had not been connected with the prisoner. The motion was denied.

Held, that the decision on the motion was correct. The fact that a mask had been found had not been communicated to the prisoner when the conversation occurred. His reply to the question indicated that he had knowledge that a mask was in some way connected with the transaction. It was proper to be shown as tending to connect the prisoner with the mask found on the night of the murder. *Murphy v. The People*, 217.

5. The accused was tried and convicted by the Court of Oyer and Terminer in the county of Onondaga, of the crime of murder in the first degree.

The prisoner and one Bishop Vader were jointly indicted for the murder of Francis A. Colvin, charged to have been committed on the 19th of December, 1873. The prisoner was tried separately.

A body was found in the Seneca river, June 22d, 1874, which was identified as the body of Colvin. The skull was found fractured.

Dr. Kimball was called as a witness. He testified to his ability to tell whether the fracture was old or recent, and then he was asked whether the fracture of the bones of the skull of the deceased, as taken from the river, was old or recent. The objection to this was, that the opinion of the witness was not competent. This objection was overruled and an exception taken.

Held, that in this ruling the court committed no error. The objection was not to the competency of the witness, but to the fact sought to be proved. The fact when the injuries to the skull were made was material and could be proved only by the opinion of those who saw it, and were competent to form an opinion. It was the best evidence of which the fact was susceptible.

Vader, the confessed accomplice in the murder, was sworn on the part of the people. The counsel for the accused objected to his evidence being received on the ground that he was a principal, equally guilty with the accused, in the commission of the offence charged.

Held, that an accomplice is, in all cases, a competent witness for the prosecution, but whether he shall be permitted to become a witness, and thus earn an exemption from punishment, which is the implied condition of his turning informer, and declaring the whole truth, is in the discretion of the court and the prosecuting officer. Whether more or less guilty does not affect their competency; the extent of their guilt, and the nature of their offence go to their credit with the jury.

The witness Moore was allowed to answer, under objection, as to the conduct of the accused about the time of the alleged murder.

Held, no error. The acts and declarations of a party are evidence against him, and whether they tend to fix a crime upon him is for the jury. The answer given was stricken out and the jury directed to disregard it, therefore the accused was not prejudiced by it, and beside the court declared it wholly immaterial.

Held, also, that it was not error to permit the witness by other circumstances and events to fix the date when the accused passed with his team. Whether it was satisfactorily fixed was a question for the jury.

Held, that the testimony of Handley was competent. It was important as tracing and identifying the boards, from which the blood was taken, as the same on which the dead body was carried from the barn to the river.

Held, that the proof of finding blood on timbers and boards in barn, six months after the alleged murder, was material. It tended to corroborate the accomplice as to the manner in which, and the course by which, the body was taken from the place of killing to the hay loft. The weight of the evidence was for the jury.

Held, also, that the admission of evidence as to the fact that the accused turned pale at the time of his arrest, was not error. Whether it indicated guilt or not was for the jury to decide.

Held, that the objection to the evidence of Dr. Richardson as to his treatment of the chips from the boards taken from the sleigh of the accused was properly overruled. There was evidence showing that hogs had been dressed upon these boards a day or two after the murder; and there was evidence that the blood of men and hogs were distinguishable, and both were upon these boards. The jury had to find upon these questions.

Held, that proof of the watches carried by the murdered man, shortly before the murder, and that one of them was in possession of the accused a few months thereafter, was proper. Possession of the fruits of a robbery or of the goods of a murdered man soon after the crime, is, unexplained, very persuasive evidence of the guilt of the one so found in possession of the goods. It is impossible to prescribe any definite rule as to the time beyond which a party accused of crime shall not be called upon to account for the possession of property stolen or taken from a murdered man.

Held, that the objection to the evidence of the wife of the accomplice as to the fact of his absence from the house as he testified, was properly overruled. It

was a part of the *res geste*, and did corroborate the witness in a material fact and was consistent with the entire statement made by him. It being merely a rule of practice, and not of law, that an accomplice should be corroborated to justify a conviction upon his evidence, it is not essential that the confirmation when offered should point directly to the defendant, if it is of any part of the material statements of the witness, the question being in all cases whether the jury under all the evidence will believe the uncorroborated part of the testimony.

(See Code of Criminal Procedure, § 399.)

Held, that the testimony in relation to the movements of the accomplice Vader between the nineteenth and twenty-fifth of December was material and the objection thereto was properly overruled. This evidence was in reply to evidence given on the part of the accused. *Lindsay v. The People*, 242.

6. The prisoner was convicted in the court of Oyer and Terminer held in Cayuga County of the crime of murder in the first degree, for killing a fellow prisoner in the Auburn State prison, with a knife.

On the trial one De Witt was called as a juror and, by the prisoner, was challenged for principal cause. He was sworn and testified that he had heard the killing talked about, had expressed an opinion of the affair from what he had heard talked, and then had an impression or opinion as to the guilt or innocence of the prisoner if what he had heard was true; that he thought it would take evidence to remove that impression, and that he would not go into the jury box entirely unbiassed; that the impression depended entirely upon the supposition that what he had heard was true; that if he went into the jury box he would decide the case on the evidence given, and that he believed if he was sworn as a juror he could render an impartial verdict upon the evidence unbiassed or uninfluenced by any impression or opinion which he then had. The court overruled the challenge.

The prisoner then challenged De Witt for favor, and that challenge was overruled. The prisoner's counsel excepted to each ruling. De Witt was then sworn as a juror.

Held, that the challenge for principal cause was properly overruled under the act of 1872.

That act provides that a present opinion or impression in reference to the guilt or innocence of the prisoner, or the expression of such an opinion, shall not be a sufficient ground of challenge for principal cause, provided the person proposed as juror shall declare on oath that he verily believes that he can render an impartial verdict according to the evidence and that such opinion or impression will not bias or influence his verdict, and provided the court shall be satisfied, that the person does not entertain such a present opinion as would influence his verdict as a juror.

Held, further, that this provision has relation to the challenge for principal cause only. The challenge for favor is left unaffected by it.

Held, that the challenge for favor is to determine the indifference of the person challenged and is to be tried by the court, and such decision is subject to review the same as other questions arising upon the trial. The court heard the juror testify and was able to judge somewhat from his appearance. He swore that he would decide the case upon the evidence, and that he believed that he

could render an impartial verdict upon the evidence, unbiassed and uninfluenced by his impressions. The court properly held the juror indifferent.

The prisoner was permitted to prove threats and acts of violence toward himself, by the deceased, and that the general character of the deceased was bad, and that he was very quarrelsome and vindictive. The accused then offered to prove that before deceased came to the prison, he was engaged in several fights, in each of which he used a knife, and cut his opponent. He also offered to prove the declarations of the deceased in regard to cutting people with razors, and that all these had been communicated to the prisoner. They were excluded by the court and the counsel for the prisoner duly excepted.

Held, that even if the proof given of the general character of the deceased was competent upon the facts of the case, there is no authority for holding that proof of specific acts of violence upon other persons, no part of the *res geste*, and in no way connected with the prisoner, was competent.

On the part of the prisoner a witness testified that he heard the deceased say to the prisoner if he ever crossed his path again he would fix him. The accused then offered to show that another person who was present at that time stated to him what the deceased had said on that occasion. This offer was excluded and an exception taken.

Held, that there was no error in the exclusion of the offer. It was an offer to prove a threat which the prisoner had already shown was made to him, and of which, therefore, he had information.

A witness testified that the prisoner, so far as he knew, was a quiet man, and good natured.

The question was then asked : " State what his disposition was when crossed or misused ? " It was properly excluded. It was not competent.

The prisoner was allowed to give evidence of the general bad character of the deceased before he came to the prison ; that he was quarrelsome and vindictive. The prosecution then produced several witnesses who had known the deceased in prison, who testified under objection, that as to quarrelsomeness and vindictiveness, his character was good.

Held, that such evidence was competent. The prisoner had attacked the character of the deceased, and thus raised that issue ; it was, therefore, proper that evidence should be received on the other side. It was competent for witnesses to speak of the character of the deceased where they had become acquainted with it ; the weight to be given to it is another question.

The prisoner's counsel excepted to that part of the charge wherein the judge stated to the jury that the deadly weapon furnished some presumptive evidence and the manner in which it was used, some presumptive evidence of an intent to take life ; and also to that part of the charge which stated that the fact that the prisoner used a deadly weapon and struck a blow at the vital part of the deceased are circumstances which furnish presumptive evidence of an intention to take the life of the deceased.

Held, that the exception was not well taken. The charge related to the fact of killing and the intention to kill. The manner in which the prisoner plunged the knife into what he knew to be the vital part of the body of the deceased raised the presumption that he intended to take life. The natural result of such an act would be to destroy life, and the law presumes he must have intended the natural consequences of his act.

At the time of the conviction of the prisoner, for murder, he was serving out a term of imprisonment in a State prison, which had not expired. He makes the claim that he could not be hung before the expiration of his term.

Held, that this claim is without foundation. To hold otherwise would give a life convict unlimited license to murder without further punishment. Beside the statute requires, in the case of murder in the first degree, the court to proceed and pass sentence, which must be executed in not less than four nor more than eight weeks thereafter, and whether this law is directory or mandatory, it is the duty of the court to obey it. *Thomas v. The People*, 298.

7. The accused was indicted and tried in the Territory of Utah, for the crime of murder in killing one John Kramer, commonly called Dutch John, and the jury rendered a verdict of murder in the first degree. Sentence in due form of law was rendered by the court.

The prisoner excepted to the rulings and instructions of the court, and appealed to the Supreme Court of the Territory, where the judgment of the subordinate court was affirmed. The prisoner sued out a writ of error, and removed the cause into this court.

Held, that sect. 3 of the act of Congress of June 23, 1874 (18 Stat. 254), allows a writ of error from this court to the Supreme Court of the Territory of Utah, where the defendant has been convicted of bigamy or polygamy, or has been sentenced to death for any crime.

The principal error assigned by the accused and the only one upon which this appellate court passed is, "That the court erred in sustaining the ruling of the District Court, that the uncommunicated threats of the deceased, made in connection with the exhibition of a pistol a short time before the homicide, were inadmissible in evidence to the jury." The testimony which was ruled out by the trial court and upon which this assignment of error is based is as follows:—
"The defendant, on the trial of this cause, called Robert Heslop as a witness in his defence, who testified:

"That, just a short time before the shooting, the deceased showed him a pistol which he (deceased) then had on his person. Deceased, at this time, was sitting on a box on the opposite side of the street from the Salt Lake House, and in front of Reggel's store.

"The prosecuting attorney admitted that this was after the deceased was ejected from defendant's saloon.

"Whereupon the counsel for the defendant asked witness the following questions:—

"What, if any, threats did the deceased make against the defendant at this time? which was objected to by the prosecuting attorney, for the reason it was immaterial.

"The objection was sustained by the court, and the defendant, by his counsel, then and there duly excepted.

"Defendant's counsel then asked witness, what, if anything, did deceased then say concerning the defendant.

"(Objected to by prosecuting attorney as incompetent.)

"Defendant's counsel thereupon stated that they expected to prove by this witness that in that conversation, a short time prior to the killing, the deceased, in the hearing of the said witness, made the threat that he would kill the de-

fendant before he went to bed on the night of the homicide, which threats we cannot bring home to the knowledge of the defendant.

"Which was objected to by the counsel for the prosecution, because it was incompetent.

"The objection was sustained by the court, to which the defendant then and there excepted.

"This witness and several others, testified that the deceased's general character was bad, and that he was a dangerous, violent, vindictive and brutal man."

Held, that the rule in regard to the admission of threats of the deceased against the prisoner in a case of homicide, where the threats have not been communicated to him, established by the decisions of courts of high authority is: "Where the question is as to what was deceased's attitude at the time of the fatal encounter, recent threats may become relevant to show that this attitude was one hostile to the defendant, even though such threats were not communicated to defendant. The evidence is not relevant to show the *quo animo* of the defendant, but it may be relevant to show that, at the time of the meeting, the deceased was seeking defendant's life."

Held further, that evidence of uncommunicated threats are always admitted in the trial of an indictment for murder, when it appears that other evidence has been introduced tending to show that the act of homicide was committed in self-defence, and that the evidence of such threats may tend to confirm or explain that defence, and in the state of mind produced on the jury by the other testimony produced, may turn the scale in favor of the defendant. In the condition of the testimony as it stood in this case the questions and offer were relevant to the issue, and should have been received. *Wiggins v. The United States*, 443.

8. The accused was indicted, tried and convicted for the crime of murder in the first degree, before the Court of Oyer and Terminer in and for the county of Oswego. The General Term of the Supreme Court, in the fourth judicial department sustained the judgment and the accused brought error.

This case is decided upon the questions arising out of the overruling of the trial court of the plaintiff's challenges to two of the persons who were sworn as jurors and found him guilty. One of them was challenged for principal cause and both for favor.

Held, that there has always been, and there is yet, notwithstanding modern legislation, a distinction between the two kinds of challenge. If one has expressed an opinion on the prisoner's guilt, it is a good ground of challenge for principal cause. If he had formed an opinion, upon reports and what he had read, of the prisoner's guilt or innocence of the accused, which it would need testimony to remove, he was disqualified — not being indifferent and impartial.

Held, that as the court is now the trier of the challenge for principal cause, as well as the challenge for favor, and when the latter immediately succeeds the other, the appellate court may consider all that has been said by the person proposed as a juror, on his examination on both challenges, or on either of them.

Betts was challenged for principal cause, as having formed and expressed an opinion, and for favor, as not being indifferent and impartial.

This juror said he had read in a local newspaper a part of the testimony given

for the people on the former trial of the accused ; had heard others talk about that trial, a good deal ; he had never expressed an opinion but had formed an impression, as to the guilt or innocence of the accused, from what he had heard and read as to it, and it would take evidence to remove such impression. He said that he thought that his previously formed opinion or impression would not bias or influence his verdict at all, and that he could take the case and decide it fairly according to the testimony without reference at all to any opinion he might have had. He further said that his opinion or impression was formed, on a supposition that the evidence which he had read was true, and if sworn as a juror he would enter upon the trial with an impression as to the guilt or innocence of the accused, and that at that present time he had an opinion as to his guilt, and that he supposed that he had an opinion against him as to his character, as a man. He also said that the opinion or impression was formed by him on reading the testimony in the newspaper, that he still entertained the same, and had never had cause to change, nor to doubt the truth of it.

Jennings, the other juror was challenged for favor, as not being impartial or indifferent between the People and the prisoner. He had formed an impression as to the guilt of the prisoner from reading parts of the published testimony, and from the talk of people, which he thought he had expressed, which impression he still had ; but he thought he could remove it, and would do it, and would be sure to, if he was sworn as a juror ; that he thought he could render a verdict without being influenced by any impression or opinion that he might have had, and that it would not bias or influence his verdict, and, that he verily believed that he could render an impartial verdict according to the evidence, notwithstanding any impression or opinion he might have formed.

Held, that the word "impression" as used in this case by these jurors, conveys the idea that these persons had more than a doubt. There had been an effect produced upon their minds, which remained, and which was so firmly lodged there that it needed a newcoming force to dislodge it. They had received it into their minds as true that the prisoner was guilty, without certain knowledge of it, but upon proofs which they held satisfactory.

Held, that it matters not what the state of mind thus produced is christened, whether an opinion or an impression, for the conclusions of these jurors, as to the guilt of the accused, is equivalent to what the books call an opinion.

Held, that the accused was tried and found guilty of murder in the first degree, by a jury, two of whom had formed, and one of them had expressed an impression that he was guilty, which impression each of the two still had, when he went into the jury box ; an impression so strong, as that in the case of one of them, it would need testimony to remove it, and in the case of the other, it did not affirmatively appear, that it would not, and it was clearly to be inferred that it would.

Held, that on the other hand, the jurors who were challenged, each professed a purpose to render a fair and impartial verdict upon the evidence, and each stated his belief to be that he could and would do so.

Held, that the Laws of 1873, provides that all challenges of jurors shall be tried and be determined by the court only ; and that, either party may except to the determination, and upon writ of error or certiorari the court may review it, the same as other questions arising upon the trial. This gives power to the appellate court to review that determination both on questions of law and questions of fact.

Held, that in this case there is only the question of fact, whether the two persons proposed, or either of them, had such a bias against the prisoner, as not to stand indifferent?

Held, that one who has formed an opinion from the reading or report, partial or complete, of the criminatory testimony, against a prisoner, on a former trial, however strong his belief and purpose that he will decide the case on the evidence to be adduced before him as a juror and will give an impartial verdict thereon, unbiassed and uninfluenced by that impression, cannot be readily received as a juror indifferent towards the prisoner and wholly uncommitted. Therefore the challenge to the favor should have been sustained. *Greenfield v. The People*, 479.

9. The accused was indicted, tried and convicted of murder in the first degree, at the Erie Oyer and Terminer, and sentenced to be hanged on the 21st day of June, 1878, between the hours of ten o'clock A.M. and two o'clock P.M. The accused obtained a writ of error to the General Term, in the fourth department, with a stay of proceedings upon the judgment. A bill of exceptions to the decisions of the trial court was settled, signed and sealed and filed with the clerk of the court. A return to the writ was made and certified to by the clerk which contained a transcript of the indictment, bill of exceptions, and sentence of the court. From the clerk's certificate it appeared that no record of the judgment on such conviction had been signed and filed. It appears from the bill of exceptions that certain exceptions to the decisions of the trial court were made, which might have been passed upon by the General Term, but that court did not pass upon them. The General Term considered the writ and return, and the matters contained therein, and determined to dismiss the writ of error on the ground that the return did not show any record of any final judgment of the Oyer and Terminer against the plaintiff in error. For that cause the writ was dismissed, and the proceedings were ordered remitted to the Oyer and Terminer of Erie County with directions to fix another day for the execution of the sentence against him. This action of the General Term is brought here for review.

Held, that a judgment of a General Term dismissing a writ of error without either affirming or reversing the judgment of the trial court, if there was no power to dismiss the writ, is a final judgment.

Held, that the General Term gave as its reason for dismissing the writ, that the return does not show any record of any final judgment of the Oyer and Terminer.

Held, that this statement is susceptible of two interpretations. One, that though there is a record returned, it does not appear that a final judgment was rendered. Another, that though there was a final judgment it does not appear that a formal record thereof was made up and returned.

Held, further, that whichever is the correct understanding of the order, the court erred.

Held, that it appears from the return, that the plaintiff in error was duly tried and convicted, by the verdict of a jury, of murder in the first degree; and the sentence of death by hanging, on a certain day, between two hours of that day, was passed upon him by the court of Oyer and Terminer, in which he was tried. This was a final judgment. The sentence given by the court is the judgment rendered by it.

Held, that the return in this case, was made in compliance with the statutory provisions, and it was error to dismiss the writ without looking into the bill of exceptions, or other matter in the return to ascertain if errors existed. The plaintiff in error had procured a return to his writ, which contained all of which the statute required the clerk to make return. By a dismissal of it and a remitting of the proceedings, with directions to fix another day for the execution of the sentence, the plaintiff in error lost the benefit of his writ. The sentence of the Oyer and Terminer, was the judgment of the court which the writ of error brought up for review.

Held, that the General Term was not confined to the matter returned to the writ of error. It might, on motion of the district attorney, or of the plaintiff in error, or at its own suggestion, have directed a writ of *certiorari* to bring before it whatever there was of record in the case, not contained in the return to the writ of error.

Held, that one tried on an indictment, and convicted by the verdict of a jury, and sentenced by the court, may obtain and file a bill of exceptions and sue out a writ of error. On a return of the clerk thereto, made in accordance with the statute, he may move the court to review the errors alleged by him. If they, or any of them, are such as that the matter contained in the return will necessarily show them, the writ of error may not be dismissed, for the reason that the return does not present a complete and formal record of the judgment and proceedings of the trial court. Such as it does present, the matter for determining must be passed upon. But if errors are alleged to the court, which may or may not have occurred, and they not be shown by the matter in the return, the court may entertain a motion by the defendants in error, or plaintiff in error, or of its own motion direct, that a writ of *certiorari* issue to the trial court, so that all may be brought up which the records of that court contain, relating to the case. And it matters not whether the record or roll thereof has been made up before or after the writ of error sued out by the plaintiff in error, or before the writ of *certiorari* is directed, or after that. Whatever took place in the trial court which was matter proper for record, may as well after as before be incorporated in a roll and returned. *Mauke v. The People*, 498.

10. The accused was indicted, tried and convicted, in the Oyer and Terminer of the county of Cayuga, of the crime of murder in the first degree. The General Term of the Supreme Court, in the fourth judicial department, affirmed the judgment, and the accused brought error.

On the trial of the accused, the *ante mortem* declarations of the deceased, were admitted in evidence, under objections. Those objections were, that the dying declarations of the deceased should not have been admitted, because it did not appear they were made under an impression of immediate dissolution, and, because they were expressions of opinion, not statements of what the deceased knew to be facts.

Held, that these objections are not tenable. The facts, as they appeared on the trial were, that on Thursday evening, August 9, 1877, the deceased, Charles Moore, a farmer living in Cayuga county, who was a son-in-law of the accused, was shot as he was returning from his pasture, and died on the Sunday following. From the time he was shot the deceased was apprehensive that the wound was fatal. On Friday the deceased repeatedly stated that he would not recover, and on Saturday morning he was told by his physician that he must die,

and there is not a doubt from the evidence but that he believed so himself. The only declarations allowed in evidence were the ones made by the deceased on Saturday, a short time before his death.

As to the second ground of objection, it appeared that the prisoner approached the deceased, disguised as a tramp, and that deceased stated, that at first he did not recognize him, but when he drew the pistol "and commenced his pranks," he knew that it was the prisoner. This was the relation of a fact, and that he spoke from knowledge derived from personal observation.

The objection was made upon the argument, that the copy of the indictment in the record does not contain the indorsed certificate of the foreman of the grand jury that it is a true bill.

Held, that as no such point was made on the trial it is not available in the appellate court. If it were, the record states that the grand jury appeared in open court, and duly presented the indictment, a copy of which is set forth. From this it must be assumed that it was presented according to law.

Held further, that the certificate of the foreman is no part of the indictment, but is the statutory mode of authenticating it, and the record furnishes evidence that it was so authenticated.

The judge in his charge to the jury expressed himself as follows: "This allegation of insanity is an affirmative issue, which the defendant is bound to prove, and you must be satisfied from the testimony introduced by him that he was insane." "If there is a well founded doubt whether this man was insane at the time he fired the pistol, you will acquit him."

Held that, take the two paragraphs of the charge together, there was no error. The question may be stated in a variety of language. There is no rigid rule prescribing the particular terms to be employed, if the substance of the rule is preserved. The jury could not have misunderstood their duty under these instructions, nor have been misled by them.

Held further, that crimes can only be committed by human beings who are in a condition to be responsible for their acts, and upon this general proposition the prosecutor holds the affirmative, and the burden of proof is upon him. Sanity being the normal and usual condition of mankind, the law presumes that every individual is in that state. Hence a prosecutor may rest upon that presumption without other proof. The fact is deemed to be proved *prima facie*. Whoever denies this or interposes a defence based upon its untruth, must prove it; the burden of showing insanity is upon the person who alleges it, and if evidence is given tending to establish insanity, then the question is presented, whether the crime was committed by a person responsible for his acts. Upon this question the presumption of sanity, and all the evidence are to be considered, and the prosecutor holds the affirmative, and if a reasonable doubt exists as to whether the prisoner is sane, or not, he is entitled to the benefit of the doubt, and to an acquittal.

Held further, that the question relating to the state of the prisoner's mind at the time the alleged act was committed, was a question of fact, and was fully litigated and fairly submitted to the jury, and their decision is conclusive. *Brotherton v. The People*, 520.

PERJURY.

1. The prisoner was tried for perjury, at the Court of Sessions held in Washington county, by the county judge of Saratoga county, and the justices of the Sessions of Washington county. It appears that the judges who signed the bill of exceptions were not members of the court when the trial was had. A bill of exceptions was proposed on behalf of the defendant, and amendments thereto proposed by the district attorney, and such proposed bill and amendments were submitted to the judge who presided at the trial and he certified in what manner the exceptions should be settled, and the judge of Washington county adopted the papers thus certified as the bill of exceptions in the case.

Held, that it was competent for the parties to consent to the settlement, although they were different persons from those who sat upon the trial.

The assignments of perjury in the indictment were founded upon the evidence of the prisoner Wood, on the trial of an action of slander. The court was requested to charge the jury that it had not been proved that the testimony, upon which the perjury had been assigned, was material to the issue tried. The same request was made, separately, in respect to each particular statement of the prisoner, upon which perjury was assigned. These requests were refused, and exceptions taken. The jury rendered a general verdict of guilty.

Held, that it must appear, either from the facts set forth in an indictment for perjury that the matter sworn to and upon which the perjury is assigned was material, or it must be expressly averred, that it was material, and the materiality must be proved on the trial or there can be no conviction.

Held, that, if a person swears falsely in respect to any fact relevant to the issue being tried, then we think he is guilty of perjury, although the case failed from defect of proof of another fact, and although the other fact alleged had no existence. It is not necessary that the false statements should tend directly to prove the issue, in order to sustain an indictment for perjury. If the matter sworn to is circumstantially material or tends to support and give credit to the witness in respect to the main fact, it is perjury. *Wood v. The People*, 116.

2. The accused was convicted of perjury, in the Court of General Sessions of New York, and sentenced to ten years imprisonment in the State prison. The perjury alleged in the indictment was committed before George H. Sheldon, fire marshal of the city of New York. The accused swore, on his examination before said marshal that, at the time of the fire, he was not in the city of New York, but was in the city of Troy. The accused also swore, on this examination, that at the time of the fire, there was in the building in which the fire occurred, a stock belonging to him and his copartner, consisting of 65,000 cigars, 185,000 cigarettes, 400 pounds of Havana tobacco, of the value of one dollar and fifty cents per pound, 645 pounds of Virginia tobacco, of the value of sixty-five cents per pound; and that he and his partner sustained a loss by the fire, of between five and six thousand dollars.

The indictment contained two counts. The first, alleging perjury in the prisoner's testimony before the fire marshal, the second, alleging perjury in swearing to an affidavit before the same officer, containing in substance the same allegations.

The accused was convicted upon the second count.

It was objected to on the trial that the law authorizing the fire marshal to administer oaths had been repealed, therefore no testimony in support of the allegations in the indictment should be received.

Held, that the objection was not tenable. The act of 1868, created the office of fire marshal, gave him power, in certain cases, to administer oaths, and enacted that false swearing before him should be deemed perjury, and punishable as such. The acts of 1870, and 1871, and the city charter of 1873, did not take from the fire marshal the power conferred upon him by the act of 1868. It is very clear, therefore, that, for any false swearing as to any matter legitimately within the sphere of the marshal's powers, an indictment may be had, and a conviction secured on competent evidence.

Held, that when the oath is set out "in substance and to the effect following" a literal copy is not required. It is not necessary to set forth the affidavit, etc., on which perjury is assigned verbatim. *Harris v. The People*, 224.

3. The defendant was tried, convicted and sentenced to the State prison, by a Court of Sessions, for the crime of perjury. The perjury was alleged to have been committed in the verification of an answer interposed in an action brought upon two promissory notes made by defendant. The complaint averred the making of the notes and their transfer to the bank [the plaintiff]; its ownership; their presentment and demand for payment when the same became due; their non-payment; and that part of said notes had been paid.

The answer to said complaint was as follows: First. The defendant, Daniel Christopher, comes into court by John A Williams, his attorney, and in answer to the plaintiffs' complaint says that he denies each and every allegation therein alleged, except as herein admitted as follows, that is to say: He admits that he, on or about June 18th, 1870, made his promissory note for \$850, payable at First National Bank, Ithaca, to the order of R. DeWitt Mann, and that the same was indorsed by R. DeWitt Mann and A. C. Ditmar; that the plaintiffs are a banking corporation and discounted said note at or about the day of its date, and paid this defendant, the then holder thereof, the sum of \$500, and no more, and that no further or other sum has ever been paid by the plaintiff for or on account of said note. Second. The defendant says that he admits the execution of the second note described in the said plaintiffs' complaint for the sum of \$1,000, made July 19th, 1870, to the order of A. C. Ditmar and indorsed by said Ditmar and R. DeWitt Mann, payable at the First National Bank of Ithaca and delivered to said plaintiffs. And this defendant, in further answer to said complaint, says that the said last described note is fully paid and satisfied, and should be delivered up to him to be cancelled. The verification was that the same was "true of his own knowledge, except as to those matters therein stated to be upon his information, and as to such matters he believes it to be true."

In the indictment perjury is first assigned on the admission contained in the answer—upon the words that the plaintiff discounted said \$850 note, "*and paid this defendant, the then holder thereof, the sum of \$500, and no more, and that no further or other sum had ever been paid by the plaintiff for or on account of said note*;" and *secondly*, upon the words in the *second* count of the answer, "*that the said last described note [the \$1,000 note] is fully paid and satisfied.*"

Held, that in all cases the assignment of perjury, on which a conviction is asked, must be of matter material to the issue to be tried, and that materiality is always a question of law; that the words in the first count designated as untrue contained no answer to the complaint; were not responsive to any allegation therein; did not help to form any issue; were not a denial, but simply a statement of what defendant admitted, and hence were wholly immaterial; that no issue was formed to the first count of the complaint; that the answer contained no denial, as the defendant only *said* he denied what he did not admit, and that this was a new affirmation that he denied. Merely saying he denied was one thing; a direct and positive denial was quite another. (*Arthur v. Brooks*, 14 Barb., 533; *Blake v. Eldred*, 18 How., 240.)

Held, that by the second count the answer contained a separate and distinct allegation that the \$1,000 had been paid; formed a direct issue with an allegation in the complaint upon a material point; and that the word "*says*" was not there used as an assertion of what defendant had done or was about to do, but was the assertion of a fact which, if true, constituted a defence to the note; that the allegation was therefore material, and perjury could be assigned thereon.

That as a general verdict of guilty was rendered in the case, the evidence given upon the trial could be properly applied to said second count, and hence the conviction could be sustained. *People v. Christopher*, 290.

4. The Court of Sessions for the county of Erie, and a jury, tried and convicted the accused of perjury. On the trial a motion was made to quash the indictment on the ground that it did not state all the facts necessary to make the defendant guilty of the offence charged, and, that it did not show the defendant guilty of any offence punishable by law. The motion was denied.

Held, that the denial of the motion was error. The gist of the offence charged was, that the defendant wilfully and corruptly swore falsely, in an affidavit made by him for the purpose of obtaining an audit of an unliquidated claim which he had against the city of Buffalo, by the common council of that city, pursuant to section 7 of title 8 of the charter thereof. It is not averred in the indictment, that the affidavit was authorized by the charter; nor that it was made for the purpose required by section 7 of title 8; nor that the claim to which it was appended was ever presented to the common council for audit. Without these averments, sustained by proof, the offence would not be made out. The rule is, that if the indictment does not set forth the facts requisite to constitute the offence charged, a conviction upon it cannot be sustained. *Ortner v. The People*, 268.

RAPE.

1. The defendant was convicted of rape. The prisoner with two companions visited the complainant at her rooms, and while there, and at that time, Mrs. Mil-leay the prosecutrix testified, that he committed the crime of rape upon her. Upon the trial the prisoner offered to prove by seven witnesses that the complainant was in the habit of receiving men there for the purpose of promiscuous intercourse, and for liquor especially. This evidence was objected to by the prosecution and rejected by the court.

Held, that the question was whether the accused ravished the prosecutrix by force, or whether she assented to such intercourse. Upon this issue all the

authorities concur in holding that evidence showing that the character of the prosecutrix for chastity was bad, is competent, and this for the reason that it is more probable that an unchaste woman assented to such intercourse than one of strict virtue. The evidence is received upon this ground, and not for the purpose of impeaching the general credibility of the witness. Evidence showing that the prosecutrix has on a previous occasion had connection with the accused is competent, and this for the reason that having done this shows a probability that she did not resist but consented to the act charged in the indictment. *Woods v. The People*, 55.

2. Conkey and Harrington were indicted for rape. The indictment stated that it was found by *twenty-four* grand jurors. It charged in first count rape against both; in second Conkey with rape, and Harrington with abetting him; in third both with assault with intent to commit rape. The district attorney was allowed to prove under objection that immediately after the offence was committed, Conkey overturned the stove, broke windows and threw articles out of the room.

The court allowed the prosecution to prove by the prosecutrix that on the day of the rape that she told one Edwards of the crime, and she added "I did not tell him all that was done. I told him they had abused me." On cross-examination she swore, "I did not tell Conkey had had connection with me. I told him the rest they had done." The prosecutrix's husband was allowed to testify: "I first told Mr. Edwards of what had happened Sunday morning. I did not tell him about Conkey getting on the bed, but my wife did. She said they abused her so she could not help about putting up the stove." Medbury, for defendant, testified: "I think I know how she is regarded in New Berlin by some of the people." He was then asked: "From the speech of people, is her character good or bad?" The question was excluded. He further swore, "I don't know how she is generally regarded in the community." Cady was called for prosecution who swore, "I think I have heard enough to form an opinion of her character. In my own mind her character is good. I know the impression of the community is, her character is good." Nehemiah Hill first swore that he did not know that he had the means of knowing about her character for chastity but added, "I think I am prepared to judge," and swore that he considered her character good. The verdict of the jury was, "That they find the prisoners at the bar guilty of the offence charged in the indictment."

Held, that the evidence of the conduct of the prisoner, Conkey, immediately after the perpetration of the offence, was properly admitted. It characterized the whole transaction, showing that the carnal knowledge which was had was effected under violence and threats, calculated to terrify and alarm the prosecutrix; the whole was one continuous act.

Held, that the disclosure made by the prosecutrix upon the first opportunity after the commission of the crime of rape, and the apparent state of mind of the party suffering from the injury, are always regarded as very material, and the forbearance to mention for a considerable length of time the circumstances of the occurrence is a reason for imputing fabrication to the accusation.

Held, that the admission of the testimony of the husband of the prosecutrix, that his wife had complained the next morning to one Edwards, in his presence, of the manner in which the defendant had abused her was not error.

Held, that on the trial of a person charged with rape, the character of the prosecutrix for chastity may be impeached by general evidence as to what is generally said of the person by those among whom the witness dwells, or with whom he is chiefly conversant, for it is this only that constitutes general reputation or character.

Held, that where a general verdict of guilty is rendered, upon several counts in an indictment, relating to the same transaction, the practice is to pass judgment on the highest grade of offence.

Held, that, although the indictment appears upon its face to have been presented by the oaths of *twenty-four* grand jurymen, notwithstanding the statute provides "there shall not be more than *twenty-three*, nor less than sixteen persons sworn on any grand jury," yet as *all* of the grand jury concurred in the finding, the defendants suffered no injustice even if one more jurymen was added to the statutory number; beside, as the defendants did not make the objection at the Oyer, it is too late to set up the objection after conviction and sentence. The error complained of does not amount to making a nullity of the indictment; it, at most, is an irregularity, not capable now of avoiding the conviction. *Conkey v. The People*, 58.

3. The prisoner was indicted, tried and convicted, for the crime of rape.

On the trial, the court was asked to charge "If the jury believe the prosecuting witness did not make prompt disclosure of the alleged wrong it is a circumstance against her, casting a great discredit on her testimony and tends strongly to disprove the truth of the accusation." The court so refused to charge and an exception was taken.

Held, that the proposition, although quite general and somewhat vague, is substantially correct. The request had no pertinency to the facts of the case, as there were no grounds for saying that the disclosure was not sufficiently prompt. The rule does not require it to be made to the first person who happens to be seen. The rule is founded upon the laws of human nature, which induce a female outraged to complain at the first opportunity, and any considerable delay on the part of a prosecutrix to make complaint of the outrage constituting the crime of rape, is a circumstance of more or less weight, depending upon the other surrounding circumstances. A want of suitable opportunity, or fear, may sometimes excuse or justify delay. *Higgins v. The People*, 65.

4. The prisoner was tried and convicted by the Court of Sessions of the county of Niagara, of the crime of rape. On the trial one of the justices of the Sessions left the bench, while the trial was in progress, and was sworn and examined as a witness on the part of the prisoner, and was subsequently recalled and examined for the prosecution, in both cases without objection. A motion in arrest of judgment was made, on the ground that the court had lost jurisdiction of the case by the justice of the Sessions leaving the bench to take the witness stand. The motion was denied.

Held, that the court did not lose jurisdiction of the case because one of its members left the bench to stand for a time, in the same room, in the witness box.

Held, also, that it was error to permit the justice of the Sessions, a member of the Court, to be sworn and testify as a witness. Not because in this instance any harm came either to the people or to the defendant; but because such practice, if sanctioned, might lead to unseemly and embarrassing results, to the hindering of justice, and to the scandal of the courts.

The court was asked to charge the jury, that they must be satisfied from the evidence, before finding the prisoner guilty, that the prosecutrix resisted him to the extent of her ability, on the occasion it is alleged the defendant committed the offence charged against him. The court declined to charge as requested.

Held, that the refusal was error. It was to the extent of her ability, and not only that, but to the extent of her ability *on that occasion*, to which the request to charge asked that the attention of the jury be directed. It is the law of this crime, in this State, that the woman must have resisted to the extent of her ability, on the occasion on which she alleges that this grievous wrong was done her. *The People v. Dohring*, 141.

5. The defendant was indicted and tried at the Court of Sessions held in the county of Suffolk.

There were two counts in the indictment, one for rape, and the other for an assault with an intent to commit a rape.

The jury brought in a verdict for rape.

The counsel for the prisoner, upon the trial, requested the court to require the district attorney to elect on which count he should proceed, which request was denied.

Held, that the denial of such request was no error. The two counts were drawn solely to meet the different aspects in which the evidence might be viewed by the jury.

The defendant had a separate trial, and George Jones, who was jointly indicted with the defendant, was sworn, under objection, as a witness on that trial.

Held, that he was a proper witness on the defendant's separate trial.

On the trial the defendant was sworn on his own behalf, and denied his guilt. For the purpose of affecting the credibility of the defendant as a witness, there was received in evidence a record of conviction of the defendant for larceny, second offence, on plea of guilty.

Held, that such evidence was properly received, for the purpose of affecting the credibility of the witness. Such evidence was held admissible in *Carpenter v. Nixon*, 5 Hill, 260; *Lake v. The People*, 1 Park. Cr., 495, 523, and in *Newcomb v. Griswold*, 24 N. Y., 298. *The People v. Satterlee*, 438.

6. The accused was tried and convicted in the Court of General Sessions of the county of New York of the crime of assault with an attempt to commit a rape. There were two counts in the indictment, and the accused was convicted under the second count. The court was asked to charge the jury, that there could be no conviction under the second count, because the intent was not alleged to be, *carnally and unlawfully to know the child*. The court refused to charge as requested, and an exception was taken.

The second count in the indictment charged the accused with an assault upon one Statia Gluth; she then and there being a female child of the age of six years, with intent then and there in and upon her, the said Statia Gluth by force and violence to then and there wilfully and feloniously commit a rape, against the form of the statute, etc.

Held, that the crime of rape, where the subject thereof is an infant child is, by statute, "the carnally and unlawfully knowing a female child under the age of ten years." Inasmuch as the indictment charges a felonious assault upon a female child of the age of six years, with the intent wilfully and feloniously to commit a rape, we think the facts constituting the offence are set forth with sufficient particularity.

It appeared on the trial by the testimony of the child assaulted, that she consented to the acts done by the accused, and his counsel insists that where there is consent there cannot be, in law, an assault.

Held, that a female child, under ten years of age, is incapable in law, of consenting to the act which constitutes rape under the statute, and hence, the question of consent becomes wholly immaterial on the trial of an indictment, either for the principal offence, or for an attempt to commit the crime. In changing the common law of rape, in such cases, the legislature necessarily changed the offence of assault with intent to commit the crime, so far as it could be affected by proof of consent by the infant. *Singer v. The People*, 547.

RECEIVING STOLEN PROPERTY.

1. The defendant was indicted in the county of Monroe for the crime of receiving stolen goods, knowing them to be stolen.

Held, that the rule is well established, that in cases like the present, where guilty knowledge is an ingredient of the offence charged, the same may be proved as other facts are proved, by circumstantial evidence, and that other acts of a like character, although involving substantive crimes, may be given in evidence to prove the *scienter*. The principal limitation of this rule is, that the criminal act which is sought to be given in evidence, must be necessarily connected with that which is the subject of the prosecution, either from some connection of time and place, or as furnishing a clue to the motive on the part of the accused.

Held, that the declarations of a party to a civil or criminal procedure, in respect to matters within his own knowledge, or of which he may be presumed to have knowledge, and relevant to the issue, are always competent against him. *Coleman v. The People*, 18.

ROBBERY.

1. The prisoner was tried for robbery in the first degree. The question submitted by the counsel for the prisoner was, did his client commit robbery in the first degree, or was it simply larceny from the person? The Recorder charged the jury: "If you believe his statement in reference to the occurrence to be true, I charge you that the force used by the prisoner is that character of violence comprehended by the statute. The statute does not define the character or characters of the force or injury that must be used to constitute one of the elements of robbery in the first degree; it nowhere says that a person shall be knocked down and beaten senseless before the assailant can come within its comprehension; but I charge you, if you believe Mr. Corson's statement to be true, that the prisoner put his arm around his neck and violently and forcibly then and there jerked his head back, in the manner he described that he did, and forcibly

and feloniously took from his person his pocket-book and money, that it was a robbery with felonious intent, and accompanied by violence."

Held, that the violence which the words proved, was sufficient to prove the charge. The amount and degree of violence which the accused must exert to bring him within the statute defining robbery, are not declared, the jury must determine that from the evidence, under the charge of the court, which in this instance was correct. *Mahoney v. The People*, 151.

SEDUCTION.

1. The plaintiff in error was indicted, under the act making seduction a crime (Chap. 111, Laws of 1848), for seduction under promise of marriage. The promise, as sworn to by the prosecutrix, was a conditional one that the accused would marry her if she would consent to an illicit connection with him; and that, relying on the promise, she consented.

Held, that this was sufficient to bring the case within the statute.

2. The prosecutrix also testified that the accused, to induce her to consent to his proposal, stated in substance, that he never would marry a girl unless he was satisfied she was a virgin, which he would ascertain only by her assenting to his proposition. But upon her expressing apprehension that he would leave her if she yielded to him, he assured her, in the strongest terms, that he would marry her. The prisoner's counsel asked the court to charge in substance, that if the promise to marry was not an existing one, but an inchoate proposition depending upon the result of illicit intercourse as furnishing evidence of virtue to complete the mutuality of the contract, the case was not within the statute. The court declined so to charge.

Held (Church, Ch. J., and Rapallo, J., dissenting), no error, as there was no just foundation in the evidence to claim that the promise was to marry only in case the accused should be satisfied that the prosecutrix was a virgin; that it was to the promise and not to any test of virginity that she gave her consent.

3. The time of the alleged seduction was February 5, 1871, followed by subsequent intercourse down to August, of the same year. It was proved, without objection, that the prosecutrix was delivered of a child February 10, 1872. The prosecution disclaimed any reliance upon this fact as corroborating the evidence of the prosecutrix; the court held the evidence immaterial.

The prisoner's counsel offered evidence that between the 5th of February and the 1st of May, 1871, the prosecutrix had carnal connection with another man, which was excluded.

Held (Church, Ch. J., and Rapallo, J., dissenting), no error; that pregnancy was not essential to the consummation of the offence charged; that the evidence rejected could only have been material to obviate the effect of that fact as corroborative evidence, and, as that was expressly disavowed, the rejection was proper.

4. Also, that the rejection could be sustained upon the ground that the offer was not limited to show any illicit intercourse at a time when the child could have been begotten, and was in effect simply to show that after the alleged seduction she had been guilty of fornication with another person, which was clearly incompetent. The prisoner's counsel then asked to have the evidence, as to the birth of the child, stricken out, which was denied.

Held, no error ; that as it was received without objection, and the right to use it in support of the charge was disclaimed, there was no strict right to have it formally stricken out.

5. The prisoner's counsel also claimed that the prosecutrix was not supported by other evidence, as required by the statute. Other evidence was given that she was alone with the prisoner at the time she charged the offence was committed, also as to her condition and appearance after it, as to his attentions and familiarities, and as to his solicitude during her sickness immediately following the alleged offence.

Held, that the statute did not require direct or positive corroborative evidence as to any of the material facts, but rather such evidence as has been ordinarily required in corroboration of the evidence of an accomplice when called as a witness against his confederates in crime, or circumstances usually relied upon as tending to prove the material facts, and which from the nature of the case are susceptible of being proved, to satisfy the jury that the principal witness is worthy of credit ; that, from the peculiar character of the offence, circumstantial evidence only can, save in rare instances, be adduced, other than from the parties concerned, and to require more would be to render the statute mere *brutum fulmen* ; and that the corroborative evidence was sufficient to meet the requirements of the statute.

6. It was also claimed by the prisoner's counsel that the charge of the court was an appeal to the passions and prejudices of the jury, and not cool and dispassionate as it should be.

Held, that if the claim was well founded it could not avail here ; that, if no legal error was committed in the submission of the cause, the judgment would not be reversed, and that legal error could not be predicated upon comments of the court upon the evidence. *Boyce v. The People*, 63.

7. The accused was indicted, tried and convicted for the crime of seduction under promise of marriage. There were five counts in the indictment charging the same offence, and the counsel for the accused moved the court to require the district attorney to elect upon which count he would rely for a conviction. The motion was denied and exception taken.

Held, that the motion was properly denied. The indictment in each of its counts alleged but one and the same offence, with such variations of allegations as were prudentially fitted to meet variations in the proof.

The court allowed the prosecutrix, under objection, to swear that her father and mother were both dead and when they died.

Held, that the evidence was not of great importance to the case of the people, but the admission of such testimony was not improper.

The complainant was allowed to testify in regard to a conversation, she said was held in October at the house of Gaylord, after the illicit connection.

Held, that such conversation was part of the *res gesta*. Like any other conversation or declaration of the accused upon the subject-matter, it was competent. The prosecutrix was called from her bed by the accused, late in the evening—this shows intimate and yielding relations on her part—and as to this fact she is supported by other evidence.

The prosecutrix was allowed under objections and exception, to answer the

question, "Did you believe him when he had connection with you, that he would marry you?" The answer was: "Yes, sir."

Held, that this allowance of the question was proper. The question at issue was, whether the consent of the prosecutrix was obtained under and by reason of the promise of marriage.

On the trial the prosecutrix testified that the illicit intercourse took place at the house of Dr. Kimball, on August 5th, 1875. She was then asked by the district attorney to go on and state in her own way what occurred on that evening. To this the counsel for the prisoner objected, and the court overruled the objection.

Held, that the evidence was material and admissible. It was of the very gist of the crime alleged, that she was thus directed to speak, and there was no better way, than for her to relate the story of it without prompting or hindrance from questions.

The prosecutrix, on the trial, was permitted by the court, under objection, to testify that she was at that time in a family-way.

Held, that there was no error in this ruling. She being, and having always been, an unmarried woman, the fact of pregnancy was positive proof of illicit connection with some one. It did not fix the accused as a participant therein; but it was a fact in the case, not incompetent to be made known to the jury.

It was urged by the counsel for the accused that the evidence of the prosecutrix was not supported by other evidence.

Held, that it is settled, by the authorities, that the supporting evidence is required as to two of the matters named in the act of 1848, and as to them only. They are the promise of marriage, and the carnal connection. Both these may be determined by the jury from the facts shown on the trial. In this case there was some supporting evidence furnished; it was for the jury to determine its strength.

Mr. Parsons, who had acted as attorney for the prosecutrix, was examined out of court, and his examination offered in evidence. The question put to Mr. Parsons, "whether he obtained from the prosecutrix, the facts stated in a complaint in a suit by her for breach of promise of marriage," was objected to by the people and the witness, that the communication was a privileged one from client to counsel. The complaint was not sworn to nor was it read over to her after it was made out. The court ruled the answer out.

Held, that the ruling was correct.

On the trial the accused and other witnesses testified to an *alibi*, and the court in his charge said to the jury, that if they were satisfied from this evidence that at the time the prosecutrix testified to, the accused was not there, that that fact disposed of her evidence. The court added: "But it is proper for me to remark that, no matter when it" — the illicit intercourse — "did take place, provided it was after the promise of marriage, and the consent, on her part, was in consequence of the promise of marriage."

Held, that as a legal proposition, this cannot be deemed objectionable.

The court charged, and to which exceptions were taken, that if the connection took place after the promise of marriage and in consideration thereof, that it was immaterial whether the promise was made in May or afterward, if it was before the seduction; that the promise might be made and the connection take

place afterward, and the crime be committed, if that connection was in consequence of that prior promise; and that the jury, in the opinion of the court, would be justified in finding a promise from her evidence if it was supported, and, that if the promise of marriage was made, as testified to by her, that was sufficient under the statute.

Held, that there was no error in the charge as made.

Church, Ch. J., dissented, on the ground of a want of corroboration as to the intercourse. Corroboration by opportunity and the like may be sufficient, but having fixed time, place and circumstance, if these are not supported by any evidence, but contradicted by all the evidence, the prosecutrix is not sustained or corroborated by proof that intercourse was possible on some other occasion than that testified to by her. The question is not, whether she ought to be credited, but, whether she is supported by other evidence. *Armstrong v. The People*, 317.

8. See note at page 830.

STATUTES.

1. The prisoner was indicted on the 24th of April, 1872, for the crime of manslaughter in the second degree. The indictment charged the commission of the crime on the 15th of March, 1872, and he was tried on the 24th of April, 1872, and found guilty.

The General Term held that the act of 1869, under which the prisoner was indicted, was repealed by section 1 of chap. 181, Laws of 1872, but such provision continued in force, as to offences committed prior to the taking effect of the repealing statute, by the saving clause in the general repealing act of 1828. (§ 6, chap. 21, Laws of 1828-1829.)

Held, that the act of 1869 is not repealed in terms or by express reference, and it is not repealed by implication, unless the two statutes are manifestly repugnant and inconsistent, or the later statute covers the whole subject-matter and was intended as a substitute for the former. The law of 1869 ceased to be operative upon offences committed after the 6th of April, 1872, the time at which the later act became a law. The two acts making different and incompatible provisions in respect to the same subject they could not both stand, and the earlier act was abrogated as to all future offences.

Held, that the act of 1872 did not deal with past offences or affect to do so; and as to them there was and could be no inconsistency or repugnancy between the two acts, but each could have full effect — the one as to offences prior to the 6th of April, 1872, and the other to offences thereafter committed.

Held, that the general rule is that laws, whether civil or criminal, are prospective, and not retroactive in their operation and effect, and the laws relating to crimes and their punishment cannot be made to retroact; and if the attempt is made by law to punish an act, already committed, which was not a crime when committed, or to subject an offence already committed to a new or additional punishment, the law will be void, as *ex post facto*.

Held, that, if the act of 1872 had been general in its terms, and covered the whole subject-matter of the former statute, and had not, in terms, been restricted to offences thereafter committed, it might have operated as a repeal, by implication, of the old law, but a repeal of a statute by implication is not favored, and

is only allowed when the inconsistency and repugnancy of the two acts are plain and unavoidable. *Mongeon v. The People*, 50.

2. The plaintiff in error was indicted, under the act making seduction a crime (Chap. 111, Laws of 1848), for seduction under promise of marriage.

The prisoner's counsel claimed that the prosecutrix was not supported by other evidence, as required by the statute. Other evidence was given, that she was alone with the prisoner at the time she charged the offence was committed, also as to her condition and appearance after it, as to his attentions and familiarities, and as to his solicitude during her sickness, immediately following the alleged offence.

Held, that the statute did not require direct or positive corroborative evidence as to any of the material facts, but rather such evidence as has been ordinarily required in corroboration of the evidence of an accomplice when called as a witness against his confederates in crime, or circumstances usually relied upon as tending to prove the material facts, and which from the nature of the case are susceptible of being proved, to satisfy the jury that the principal witness is worthy of credit; that, from the peculiar character of the offence, circumstantial evidence only can, save in rare instances, be adduced, other than from the parties concerned, and to require more would be to render the statute mere *brutum fulmen*; and that the corroborative evidence was sufficient to meet the requirements of the statute. *Boyes v. The People*, 63.

3. The defendants were appointed Commissioners of Excise of the city of Schenectady within ten days after the passage and under the provisions of the act of 1870, chap. 175, Laws of 1870. On the first day of April, 1873, Dorn, McClyman and Palmer were appointed commissioners by the mayor alone. Defendants claimed that such appointments were invalid, and on that account claimed to hold over.

Held, that the rule of the statute is for the mayor to appoint in all the cities, except New York and Brooklyn, and the provision for the subsequent appointments, was intended to confer the power upon the same officers, and the language should be construed as though it had read, the same officers shall appoint in the manner above described. There is no reasonable doubt of the intent of the legislature. "It is not the words of the law, but the internal sense of it, that makes the law; the letter of the law is the body, the sense and reason of the law is the soul." *The People v. Gates*, 67.

4. The plaintiffs in error were convicted of a misdemeanor.

The indictment charged and the proof was that the plaintiffs in error, were commissioners of police and unlawfully removed one Sheridan, an inspector of election, from his office when he was not actually on duty on a day of registration, revision of registration or election, without first giving him notice in writing, setting forth the reasons for such removal as required by the act of 1872, chapter 675, § 13.

On the trial the accused offered to prove that Sheridan had been guilty of improper conduct as an election officer, and on the day of his removal threatened that he would stuff ballot-boxes, which facts were communicated by way of affidavits to the commissioners before removal, and that they believing the charges acted under them in good faith, and under belief and legal advice that

the cause of removal brought the case under one of the statutory exceptions excusing notice.

This evidence was excluded as irrelevant and immaterial.

Held, that the statute requires notice to be given as a rule; the exception relates to a particular time, and particular cause. Both must exist to justify removal without notice. The time must be on a day of registration, revision of registration or election, and the cause must be improper conduct as an election officer, and in addition the incumbent must be on duty. Unless these facts all exist, notice is indispensable to a removal.

Held, further, that the manifest construction of the statute is as if it read "The inspectors of election shall hold office for one year, unless sooner removed for the want of the requisite qualifications, or for cause, in either which cases such removal shall only be made after notice in writing to the officer to be removed, unless made while the inspector is actually on duty on a day of registration, revision of registration, or election, and for improper conduct as an election officer.

5. The offer of the accused to prove, that they believed the charges made were true, and that they acted in good faith and under legal advice that they had a right to remove for cause without notice was ruled out by the court, and it held that intentionally doing the act prohibited constituted the offence.

Held, that the accused made a mistake of law. Such mistakes do not excuse the commission of prohibited acts. The rule is, that in acts *mala in se*, the intent governs, but in those *mala prohibita*, the only inquiry is, has the law been violated? The act prohibited must be intentionally done. A mistake as to the fact of doing the act will excuse the party, but if the act is intentionally done, the statute declares it a misdemeanor, irrespective of the motive or intent. To sustain an indictment for doing a prohibited act, it is sufficient to prove that the act was knowingly and intentionally done.

6. It is claimed that the Court of Oyer and Terminer had no jurisdiction to try the indictment under chapter 837 of the Laws of 1855.

Held, that there is nothing in the statute showing an intention to deprive the Oyer and Terminer, from hearing and determining misdemeanors by indictment and trial in the usual way. *Gardner v. The People*, 175.

7. *Held*, that, repeal of statutes by implication is not favored and only takes place when two acts are so inconsistent that both cannot stand, and then the later act prevails. Laws, special and local in their application, are not deemed repealed by general legislation, except upon the clearest manifestation of an intent by the legislature to effect such repeal, and ordinarily an express repeal by some intelligible reference to the special act is necessary to accomplish that end. *The People v. Quigg*, 182.

8. The accused was indicted and tried by the Court of Sessions of Jefferson county, for selling strong and spirituous liquors, wines, ale and beer, in quantities less than five gallons at a time, to be drank on the premises, without having an inn-keeper's license therefor. The jury found him guilty. The Supreme Court reversed the judgment and the people bring error.

It appeared on the trial that the accused did sell intoxicating liquors in the quantities named to be drank upon his premises, and without having a tavern license. It also appeared that the board of excise gave the accused a license to sell on his premises and that such license was granted under the fourth section of the act of 1870. It was claimed by the accused that the act of 1857 was so in conflict with section four that it was repealed and that section four was in force.

Held, that the act of 1857 was not repealed by implication or by express terms, by the act of 1870, only where the provisions of the act of 1857 were inconsistent or in conflict with the provisions of the act of 1870.

Held, that to determine what is repealed is left to the judicial inquiry of what conflicts and what is inconsistent, and the conflict and inconsistency must be plain and unavoidable to make the law of 1857 fall. Take the two acts and read the parts under consideration and consecutively, and they will flow, with some pruning of the verbiage, as one well constructed, consistent enactment, harmonious in all its parts. This being so, the effect of the clause of the act of 1870, that "the provisions of the act of 16th April, 1857, except where the same are inconsistent or in conflict with the provisions" of the act of 1870, "shall be taken as a part of" it, "and be and remain in full force and effect throughout the whole of this State," makes those parts of the act of 1857 in question, in full force and a part of the excise law of the State. *The People v. Smith*, 342.

9. The accused was indicted in the county of New York for selling wine without license, in a quantity of less than five gallons, to be drank upon his premises.

The counsel for the accused claims that the act of April 16, 1857, has been rendered inapplicable to the county of New York.

Held, that while the law passed April 16, 1866, was in force, the act of 1857 was inapplicable, but that law was expressly repealed by section 6 of chapter 175 of the Laws of 1870; and that section declared that the act of April 16, 1857, should be and remain in full force and effect throughout the State, so far as it was not inconsistent or in conflict with the provisions of the act of 1870. The law of 1857, in regard to the objection made, not being inconsistent with the law of 1870, is in full force. *Schwab v. The People*, 354.

10. The accused was indicted for the crime of assault and battery, and, on a plea of guilty, was sentenced by the Court of Sessions of Richmond county, "to be imprisoned in the Kings county penitentiary for the term of six months."

The accused claimed that the sentence was unlawful, because the place of imprisonment named by the court was not the county jail of Richmond county.

The General Term in the second judicial department, affirmed the judgment of the Court of Sessions, and the accused brought error.

Held, that by the act of 1874, it is made lawful for the several boards of supervisors in this State to agree with any county, having a penitentiary therein, to receive into it, and there keep, any person sentenced to confinement for a term not less than sixty days. After notice that such agreement had been made, this law made it the duty of the courts of the counties so agreeing, whenever they sentenced a prisoner for a term not less than sixty days, if it was not a State prison offence, to sentence him to a penitentiary so agreed upon.

Held, that the Legislature had the power to designate a place of imprison-

ment in a part of the State other than the county jail of the county where the offence was tried. Though the Revised Statutes prescribe the county jail as the place of imprisonment for those guilty of certain misdemeanors, the Legislature is not restricted thereby, but may provide by law for another place and different institution within the State. *Brown v. The People*, 516.

11. The accused was indicted for forgery in the third degree for executing the following instrument :

"No. —. SARATOGA COUNTY TREASURER'S OFFICE,

"*Ballston Spa, June 16, 1875.*

"In pursuance of a resolution passed November, 1874, by the board of supervisors of Saratoga county, the county of Saratoga promises to pay at the Saratoga County Treasurer's office, on or before the 15th of February, 1876, to the First National Bank of Ballston Spa, or bearer, \$10,000, at seven per cent. interest, value received.

"\$10,000.

HENRY A. MANN, *Treasurer.*"

At the time of the execution of the foregoing paper the accused was treasurer of Saratoga county. This paper was discounted by the payee and the proceeds were received by Mann. It was shown on the trial that Mann had no authority to make or issue such instrument. The accused was convicted at the Washington county Court of Oyer and Terminer. The General Term of the third judicial department reversed the judgment, and the people bring error.

Held, that the statute under which the accused was convicted defines the offence of forgery in the third degree to be, the falsely making or altering, with intent to defraud, any instrument or writing "being or purporting to be the act of another," whereby any pecuniary demand shall be or purport to be created, etc., etc. That the "act" referred to in the statute is the making of the instrument, and that the offence consists in falsely making an instrument purporting to be made by another.

Held further, that the offence intended to be defined by the statute is forgery, and not a false assumption of authority. One who makes an instrument signed with his own name, but purporting to bind another, does not make an instrument purporting to be the act of another. The instrument shows upon its face that it is made by himself and is in point of fact his own act. It is not false as to the person who made it. The wrong done, where such an instrument is made without authority, consists in the false assumption of authority to bind another, and not making a counterfeit or false paper. *The People v. Mann*, 528.

TRIAL.

1. *Held*, that where a general verdict of guilty is rendered, upon several counts in an indictment, relating to the same transaction, the practice is to pass judgment on the highest grade of offence. *Conkey v. The People*, 58.

2. It was also claimed by the prisoner's counsel that the charge of the court was an appeal to the passions and prejudices of the jury, and not cool and dispassionate as it should be.

Held, that if the claim was well founded it could not avail here ; that, if no

legal error was committed in the submission of the cause, the judgment would not be reversed, and that legal error could not be predicated upon comments of the court upon the evidence. *Boyce v. The People*, 63.

UNWHOLESOME MILK.

1. The accused was convicted upon a general plea of guilty to an indictment, and sentenced, by the Court of General Sessions of the city of New York, to imprisonment in the penitentiary of the city of New York for thirty days, and to pay a fine of \$200.

The indictment charged the defendant with exposing for sale in the city of New York, impure and unwholesome milk, adulterated with water, against the form of the statute; with keeping and offering such unwholesome milk for sale in violation of the sanitary code and of the statute, and, with bringing it into the city of New York for sale, in violation of an ordinance of the sanitary code, passed by the board of health of the city, February 28, 1876, of which the publication is alleged, and which is set out in the third count in full.

The General Term of the Supreme Court, in the first judicial district, affirmed the judgment, and the defendant brought error.

The question presented is as to the validity of the sentence.

Held, that by the Laws of 1862, as amended by section 1 of chapter 544 of the Laws of 1864, the knowingly selling or exposing for sale of impure, adulterated or unwholesome milk is made a misdemeanor, punishable by a fine of not less than fifty dollars, and if the fine is not paid, by imprisonment for not less than thirty days in the penitentiary or county jail, or until the fine be paid. Section 4 declares that the addition of water or any substance, other than is sufficient to preserve the milk while in transportation to market, is an adulteration. This is a general statute.

Held, that the board of health of the city of New York, February 28, 1876, enacted the following ordinance, and made it a part of the sanitary code: "No milk which has been watered, adulterated, reduced or changed in any respect by the addition of water or other substance, or by the removal of cream, shall be brought into, held, kept or offered for sale at any place in the city of New York, nor shall any one keep, have, or offer for sale any such milk."

Held, that the authority to pass sanitary ordinances was conferred on the board of health of the city of New York by chapter 335 of the Laws of 1873, which created the board.

Held, that the eighty-second section of that act requires the board to adapt the existing sanitary ordinances to the changes made by the act, in the administration of the sanitary affairs of the city, and authorizes and empowers the board to add to the sanitary code, from time to time, additional provisions for the security of life and health in the city, and declares that any violation of the code shall be treated and punished as a misdemeanor, and the offender shall also be liable to pay a penalty of fifty dollars, to be recovered in a civil action in the name of the mayor, aldermen and commonalty of the city.

Held, that the third count of the indictment was drawn with reference to the ordinance cited, and to ascertain the specific punishment for the offence, reference must be had to the general statute, which enacts that "every person who

shall be convicted of any misdemeanor, the punishment of which is not prescribed in this or some other statute, shall be punished by imprisonment in the county jail not exceeding one year, or by a fine not exceeding \$250, or by both such fine and imprisonment."

Held, that the court in this case imposed its sentence of fine and imprisonment under the third count of the indictment which described the crime to be a violation of the ordinance, which violation was declared to be a misdemeanor, the punishment of which was nowhere prescribed except in the revised statutes, which is recited above.

Held, that the joinder of several distinct misdemeanors in the same indictment is not a cause for the reversal of the judgment on writ of error when the sentence is single, and is appropriate to either of the counts upon which the conviction was had.

Held, that the Legislature in the exercise of its constitutional authority may lawfully confer on boards of health the power to enact sanitary ordinances, having the force of law within the districts over which their jurisdiction extends. This power has been repeatedly recognized and affirmed, and ordinances designed to prevent the sale of adulterated milk are manifestly within the scope of sanitary regulations.

Held, that the statute of 1862, relates only to *selling or exposing* impure or adulterated milk for sale, while the offence in the ordinance is, *bringing adulterated milk into the city of New York for sale*, therefore a greater punishment can be inflicted under the ordinance than is authorized by the statute.

Duplicity in the third count was urged on the ground that such count united the offence of bringing impure milk into the city for sale with the charge of offering it for sale; the one being a violation of the ordinance, and the other a violation of the statute—offences requiring different punishments.

Held, that the objection of duplicity is not well taken. The third count purports to proceed exclusively upon the ordinance, and would not justify a conviction under the statute, although it contains averments which might sustain a count for the statutory offence. The allegation of the offering of the milk for sale may be rejected as surplusage, leaving the conviction to stand upon the charge of bringing it into the city for sale. *Polinsky v. The People*, 469.

VERDICT.

1. *Held*, that the verdict was a general one, that is, guilty of the offence alleged in the indictment, i.e., burglary in the third degree. The punishment was greater than that fixed by law, therefore, the case is remanded to the court below, for the proper sentence. *Harris v. The People*, 113.

2. The accused were tried at a Court of Sessions held in Fulton county, for a violation of the excise law.

After the charge of the court, one of the jurors stated that one of them thought they had better retire. In answer to this the court said that the evidence was uncontradicted and undisputed and that they would not allow the jury to retire. The court then directed the jury to find the accused guilty.

To this direction their counsel excepted.

Under this direction of the court the jury found the defendants guilty of the misdemeanor charged in the indictment, and they were sentenced.

Held, that it was error for the court to direct a verdict of guilty. The defendants were entitled to a jury trial. The right to a trial by a jury means, that the persons indicted are entitled to have the question of their guilt passed upon by the jury. It does not mean that the court is to decide that question. The action of the court below was erroneous in law, and dangerous as a precedent. *Howell v. The People*, 438.

3. The accused was indicted in the Oyer and Terminer held in the county of Ontario, for grand larceny, and by that court the indictment was sent for trial to the Sessions of that county. After the charge to the jury, they retired to consider their verdict and the justices of the Sessions who sat as part of the court during the trial, left the court room. While they were absent, the jury came in and stated that they had agreed upon their verdict. The county judge then, in the absence of the other members of the court, received the verdict of the jury. The jury was polled at the request of the counsel for the accused, and each answering guilty, their verdict was entered by the clerk. The counsel for the accused made a motion in arrest of judgment, upon the ground that the verdict was improperly received and entered. The motion was denied and the accused was sentenced by the county judge, to imprisonment in the Monroe county penitentiary for one year.

Held, that the rule is too well settled to be departed from or modified, that a verdict must be delivered in open court. To permit verdicts to be received otherwise than in open court, would lead to the greatest abuses. When the verdict was received, in this case, the court was held by the county judge only, and he cannot, under the law, hold a Court of Sessions. The conviction was, therefore, illegal and must be reversed. *Hinman v. The People*, 536.

WITNESS.

1. The defendant was indicted for forgery and was tried and convicted in the Court of Sessions of Ontario county. The judgment was reversed by the General Term in the fourth Judicial Department, and error was brought by the People to this court.

Upon the trial the defendant presented himself as a witness in his own behalf, and was sworn. Upon his cross-examination he was asked "How many times have you been arrested?" To this question the counsel for the defendant objected, stating as his objections, that it was incompetent to affect his credibility as a witness; that it tended to degrade the witness; that he was privileged from answering it, as it had no direct bearing upon the issue in the case; and that better evidence of the fact existed. The court overruled the objection and the witness answered "five times, I believe."

Held, that while it would not be competent to introduce evidence of particular facts to impeach the witness, yet the authorities recognize a distinction between independent evidence introduced for the purpose of impeaching a witness, and the questions which are permitted, in the discretion of the court, to be put to a witness, tending to affect his *credibility*. It was permissible to ask the defendant questions as to particular facts, although such evidence would not be received

from impeaching witnesses, but the evidence sought to be obtained must legitimately tend to impair the credit of the witness for veracity, either directly or by its tendency to establish a bad moral character.

Held, that the general rule is, that a party cannot avail himself of an error in allowing or refusing a privileged question put to a witness, yet where the witness is also the party, there is no reason for the application of the rule. By taking the stand as a witness, he is not thereby deprived of his rights as a party, and it follows that his counsel, while he is in the witness-box, has a right to speak for him, and that an error committed by the court against him may enure to his benefit as a party. The witness was privileged from answering the question, and the objection was well taken by his counsel, and the exception is available.

Held, that neither in the *Brandon Case* (42 N. Y., 265), *Connor's Case* (50 N. Y., 240), nor in the *Real Case* (42 N. Y., 270), was this question of privilege presented, or decided. *The People v. Brown*, 363.

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